



REPORTS OF CASES

DECIDED IN THE

COURT OF COMMON PLEAS.

BY

S. J. VANKOUGHNET, M.A.,

AND ON HIS RESIGNATION BY

GEORGE FREDERICK HARMAN,

BARRISTERS-AT-LAW AND REPORTERS TO THE COURT.

CHRISTOPHER ROBINSON, Q.C.,

EDITOR.

VOLUME XXII.

CONTAINING THE CASES DETERMINED
FROM MICHAELMAS TERM, 35 VICTORIA, TO HILARY TERM, 36 VICTORIA,
WITH A TABLE OF THE NAMES OF CASES ARGUED,
A TABLE OF THE NAMES OF CASES CITED,
AND DIGEST OF THE PRINCIPAL MATTERS.

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J U D G E S

OF THE

C O U R T O F C O M M O N P L E A S .

THE HON. JOHN HAWKINS HAGARTY, C. J.

“ “ JOHN WELLINGTON GWYNNE, J.

“ “ THOMAS GALT, J.

Minister of Justice :

RIGHT HON. SIR JOHN ALEXANDER MACDONALD, K.C.B.

Attorney-General :

THE HON. OLIVER MOWAT.

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REPORT OF CASES
IN THE
COURT OF COMMON PLEAS.

MICHAELMAS TERM, 35 VICTORIA, 1871.

Present :

THE HON. JOHN HAWKINS HAGARTY, C. J.

“ JOHN WELLINGTON GWYNNE, J.

“ THOMAS GALT, J.

MCRÆ V. TORONTO AND NIPISSING RAILWAY COMPANY.

*Railways—Government aid to—34 Vic., ch. 2, sec. 3—“ Construction”—
Meaning.*

Held, that the defendants, who had contracted merely for the *grading and fencing* of a portion of their road before the date specified in sec. 3 of 34 Vic., ch. 2, were not disentitled to aid under that section, as having contracted for the *construction* of such portion of their road.

SPECIAL CASE.

On the 1st of November, 1870, defendants made a contract with some person or persons for the grading and fencing of a portion of their line of road between Uxbridge and the Portage Road. On March 2nd, 1871, defendants contracted with plaintiff to build, construct, and complete the same portion of the road, with the exception of the grading and fencing (previously contracted for), at a specified rate per mile, to be paid for, on the certificate of their engineer, as the work proceeded, with the exception of 15 per cent., to be retained until three months after the completion of the contract, if the defendants were entitled to claim aid from the Government of Ontario under the

provisions of the "Act in aid of Railways" (1871) ; but if the defendants were not so entitled, then said deduction of 15 per cent. was to be paid by the defendants to the plaintiff in one month from the completion of the contract.

By this statute (34 Vic. ch. 2) the Lieutenant-governor in Council might authorize payments from time to time to any railway company of sums not less than \$2,000, nor more than \$4,000, per mile, of any portion or portions of such railway, after report by the Commissioner of Agriculture and Public Works, that the Company had completed such portion of its road, in respect of which payment was to be made, including sidings and stations, within the period prescribed by its charter.

Section 3 provided that no such authority should be given in respect of any portion of a railway *for the construction of which portion a contract had been entered into prior to the 7th day of December, 1870*, nor until satisfactory proof had been given that the capital and assets were sufficient for the completion thereof within the appointed time.

The question upon which the opinion of the Court was sought, was whether the defendants were disentitled to aid under the 2nd section of the Act, in consequence of their contract for the grading and fencing of their road having been entered into before the 7th of December, 1870.

The whole argument turned on the meaning of the word "construction" as used in the 3rd section of the Act.

T. Moss, for the plaintiff, referred to *Webb v. Manchester and Leeds Railway Company*, 4 M. & C. 116 ; *Gildart v. Gladstone*, 11 Ea. 685 ; *Birks v. Allison*, 13 C. B. N. S. 23 ; 31 Vic. ch. 41 ; 34 Vic. ch. 2 ; 27 & 28 Vic. ch. 121, sec. 31, (Imp.) ; *Grantham Canal Company v. Ambergate, &c., Railway Company*, 21 L. J. Q. B. 322.

J. H. Cameron, Q. C., contra, referred to the meaning of the word as given in Johnson's and the Imperial Dictionary ; also to its Latin derivation, and the Greek equivalent therefor, both denoting a *complete* putting

together, a finished, or "a going concern," in Lord Cairns's words, as cited in *McCallum v. G. T. R. Co.*, 30 U. C. 122.

HAGARTY, C. J., delivered the judgment of the Court.

The point submitted for our decision on this somewhat singular contract is, whether the fact of the defendants having contracted for the grading and fencing of this portion of the road prior to the day named in this Act, viz., December 7th, 1870, are disentitled to any assistance from the Government under the second section of the Act.

Mr. Moss, for the plaintiff, was forced to argue that the fact of the Company having contracted before the appointed day for any substantial part of the work, absolutely disentitled them to the benefit of the Act.

The intention of the Legislature seems very plain. The expressed intention is to give aid towards the construction of railways to or through sections of the country remote from existing thoroughfares, or passing through thinly settled tracts, or leading to the Free Grant territory, or to the inland waters; but they at the same time provide that such aid was not to be given to railways for the construction of which provision had been already made by contract prior to December 7th, 1870, the first day of the Session in which this legislation was announced and perfected.

Where the construction of the road, or portion of road, had been already provided for, the Government aid was not to be given. The fact that a company had succeeded in contracting for the grading and fencing of a portion of a road cannot in our judgment amount to a contract for the "construction" of such portion. A contract to "construct" ten or twenty miles of a railway must mean to put such portion in a state to be used as a railway, and such a contract could never be fulfilled merely by grading and fencing the line.

A company might succeed in providing funds to grade and fence a portion, and then be utterly unable to do more.

It seems impossible for us to hold that, being in that position on the 7th of December, 1870, they were disentitled to aid under the statute. Whether they should obtain such aid or not would be a matter for executive consideration ; it is sufficient for us to hold, as a matter of legal construction, that they are not disentitled by the words of the Act.

If a statute provided certain new regulations for the governance of railways, and then enacted that such provisions should not apply "to any railway constructed before the passing of this Act," we think the exception would certainly not apply to an undertaking which, before the Act, had been graded and fenced with a view to making it ultimately assume the shape of a "railway." We think a narrow strip of land graded to a particular level, and fenced on each side, is not a "railway," although by the expenditure of money it may finally acquire that character.

In the discussion of a case of some celebrity, *Hammer-smith Railway Company v. Brand*, L. R. 4 H. L. 171, as to the right of compensation for damage to the owners of property affected by the working of the railway, but where no land is taken, the expression "construction of the railway" was criticised, but it was in a sense different from this case, viz., as to the compensation for injuries to parties, &c., &c. Lord Cairns says, "Parliament does not look upon the words 'construction of the railway,' or 'the execution of the works authorized,' as meaning the digging out so much land, the putting so much brick and mortar together, the making a viaduct or embankment, or the mere structural aspect of the work : it looks upon the railway as an undertaking, as a going concern, if I may so call it, as a thing which is to be there for a certain purpose and to fulfil a certain end which the Legislature had in view, &c." See also Mr. Justice Lush's words in the same case. This case is noticed in *McCallum v. Grand Trunk Railway Company*, 30 U. C. 127.

We think that the defendants are entitled to our judgment.

Judgment accordingly.

HOPE V. WHITE ET AL.

Distress for rent—Seizure of sheep—Liability of landlord—Trespass.

It is illegal to distrain sheep for rent when there are other goods upon the premises sufficient to satisfy the claim; and trespass was therefore held to lie against a landlord for the act of his bailiff in so distraining. it appearing that he had spoken of his making the sale, and had received the proceeds thereof, and no evidence being offered of his non-complicity therein.

THE declaration stated, in the first count, that plaintiff was tenant to defendant White, and defendant wrongfully distrained divers goods and chattels, viz.: 4 cows, 1 span of horses, 19 sheep, and 14 lambs, as a distress for rent, and wrongfully sold the same, whereas no rent was due.

2nd Count. That plaintiff was tenant to defendant McLean, and same as first count.

3rd Count. Setting out tenancy of White, who, without plaintiff's knowledge, assigned to McLean, and plaintiff, without notice, paid to White before distress; yet defendant distrained the property mentioned and wrongfully sold, &c., no rent being due.

4th Count. Trespass to plaintiff's goods as described in first count.

Pleas by Keller and McLean (White having allowed judgment to go by default), not guilty by stat. 11 Geo. II, ch. 19, sec. 21.

The case was tried at the last Fall Assizes, at Toronto, before Galt, J.

The only point necessary to be noticed is that bearing on defendant McLean's liability for the act of his bailiff Keller in seizing plaintiff's sheep.

The jury found that there was other sufficient distress besides the sheep.

The objection was then taken that, granting the seizure of the sheep to be illegal, McLean was not liable.

The evidence was that McLean had given a warrant to seize the goods, chattels, and growing crops. The plaintiff seized all, including the sheep, no one seeming to have any

idea that any peculiar exemption attached to them. The bailiff swore McLean told him to distrain plaintiff's goods.

After taking this objection, at the close of plaintiff's case, defendant McLean was called in his own behalf. He was not asked anything on either side as to any knowledge of the kind of property seized, or of his having ratified or repudiated anything done; but he said, "when I signed the warrant, and *sold the distress*, I did not know plaintiff had paid the rent."

It was admitted he was paid his claim by Keller out of the proceeds of sale. Nothing appeared to have been left to the jury as to whether McLean assented to, or ratified, or had knowledge of the sheep being seized; nor did it seem that, although many points were urged to him by counsel, he was asked to submit any such questions.

Damages were assessed against White by default. The jury found the value of the sheep, \$150.

There was a verdict for defendants McLean and Keller, and leave was reserved to plaintiff to move to enter a verdict for him against them for \$150, if the Court thought him entitled to recover.

In Michaelmas term, *K. McKenzie*, Q. C., obtained a rule to set aside the verdict for Keller and McLean, or so far as it related to the 4th count, and to enter a verdict for plaintiff on the 4th count for \$150 on the leave reserved, on the ground that it was trespass to seize plaintiff's sheep for a distress, while there were other sufficient goods liable to distress on the premises, and the Judge should have directed a verdict for plaintiff on the 4th count,* and for a new trial on the law and evidence.

McMichael shewed cause, citing *Narget v. Nias*, 1 El. & El. 439; Woodf. L. & T. (last ed.) 744; *Dawson v. Alford*, 3 Dy. 312 a; *Lewis v. Read*, 13 M. & W. 834; *Freeman v. Rosher*, 13 Q. B. 780.

K. McKenzie, Q. C., contra, cited *Keen v. Priest*, 4 H. & N. 236; Add. Torts. (last ed.) 504, 533: 51 Hen. III., stat. 4; *Gauntlet v. King*, 3 C. B. N. S. 59; *Haseler v. Lemoyne*, 5 C. B. N. S. 530.

HAGARTY, C. J., delivered the judgment of the Court.

There seems to be no doubt that sheep are not distrainable while there are sufficient other goods to satisfy the claim. The stat. 51 Hen. III., ch. 4 so declares, and its curious phraseology is quoted in *Keen v. Priest* (4 H. & N. 236). The prohibition may, we think, be considered universal under the words, "*Nul home de religion ne auter.*"

This case was for taking sheep, the first count averring that the sheep were taken, although there was other sufficient distress. Second count, trespass. Third count, trover.

Watson, B., says, "From the earliest period of our history, it has been the law that sheep are not distrainable, if there are other goods on the premises to satisfy the debt. The seizure was therefore wholly illegal. If the plaintiff had replevied, he would have been entitled to a return of the sheep. The defendant never had any rightful possession of the sheep; therefore the case does not come within 11 Geo. II. ch. 19."

Martin, B. says, "As there were other goods, the sheep might have been rescued."

Narget v. Nias (1 El. & El. 439). The action was *quare clausum fregit*, assault, and carrying away the goods and chattels of plaintiff. Plea, not guilty by statute.

It appeared that there was a distress for rent, and defendant seized a spade and fork of plaintiff, being tools used by him in his trade, and the jury found there was other sufficient distress. It was objected that trespass did not lie, the tools not being in actual use. The argument was very full. Lord Campbell, in giving judgment, reviews the authorities, citing Lord Coke, that taking tools of trade, while there was other sufficient distress, was against the ancient common law of England, and adds, that as it is in itself wrongful, "it is difficult to discover any legal principle why it should not be the subject of an action of trespass, seeing that, as a general rule, wherever goods are wrongfully taken, trespass will lie." * * *Dawson v. Alford*, 3 Dyer 312 a, shews it is not necessary for plaintiff in his declaration to allege that there were other goods of suffi-

cient value which might have been distrained, but the defendant must shew in his answer, when he justifies, that no other sufficient distress could be found."

We are bound by these authorities that the declaration here is sufficient.

It is then objected that McLean is not responsible for his bailiff's alleged acts, unless he is shewn to have authorized or sanctioned them. It was proved he received the money from the bailiff from the sale of the sheep.

Lewis v. Read (13 M. & W. 834) is in point. The bailiff had seized goods of the plaintiff's beyond the boundary of the farm called Penybryn, for which rent was due by another person. The defendant received the proceeds of the sale. Parke, B. : "There is no doubt that the acts of defendant Read, in directing the sale of the sheep and receiving the proceeds, were a sufficient ratification of the acts of the bailiff in making the distress as to such of the sheep as were taken on the Penybryn sheepwalk, because the taking of them was within the original authority given to the bailiff by O., as the agent of Read. As to the others, not taken in Penybryn, and as to which, therefore, the authority was not followed, Read could not be liable in trover unless he ratified the acts of the bailiff, with knowledge that they took the sheep elsewhere than on Penybryn, or unless he meant to take upon himself, without enquiry, the risk of any irregularity which they might have committed, and to adopt all their acts. There appears to have been evidence quite sufficient to warrant the jury in coming to the conclusion that he did, in this sense, ratify the acts of the other defendants; but as this question was not left to the jury, the defendant is entitled to a new trial." It does not appear from the report that any objection was taken at the trial on this point, but it says "there was no direct evidence that defendant was informed when the sheep were taken, or had any distinct knowledge that it was not made in the Penybryn sheepwalk. The point appears in the motion in term."

In *Freeman v. Rosher* (13 Q. B. 780) a bailiff had im-

properly removed a fixture, and paid proceeds to landlord, who received it without notice of any irregularity, nor did he make enquiry. Patteson, J., giving judgment, says: "In the present case it was taken by consent, as is found by the jury, that the evidence to fix the defendant consisted solely of the warrant of distress, and of the receipt of the proceeds of the sale. The defendant had received no information of the making of the distress, neither had he interfered about the sale. The facts negative a ratification with knowledge, and there were no facts to warrant an inference that he intended anything beyond what appears. *Lewis v. Read* is an authority for defendant."

In *Gauntlet v. King* (3 C. B. N. S. 59), a bailiff had seized some books and papers of tenants on the premises, and, on action brought against him and the landlord, it being assumed the books were exempt, the same point was taken. After seizure the landlord, on tenant remonstrating, ordered bailiff to give them up, which was done. Cockburn, C. J., says: "The books and papers were undoubtedly taken by way of distress. The bailiff whose business it was to make the levy found the articles, amongst other goods of the tenant, in a cupboard, and he seized them all. It appears to me that puts an end to the question." Williams, J., expresses surprise why the things were assumed to be not distrainable. He says the evidence shewed the asportation was complete before the landlord ascertained what he had taken. * * * In either view the plaintiff must succeed." Cockburn, C. J., asks, "Do you contend that a landlord, who gives a general authority to a broker to distrain, is not responsible for the act of the broker in exceeding his authority?"

We would gather from this case that the Court considered the landlord liable in any event.

In *Haseler v. Lemoyne* (5 C. B. N. S. 530) there was evidence of an adoption by the landlord of the bailiff's acts, but there was some discussion as to the general principle. Williams, J.: "It is quite consistent with the view we take, that the landlord is not liable for the acts of the

bailiff in distraining upon premises other than the demised premises, or for seizing things not by law distrainable. But where, as here, he takes the goods which it was meant he should take, the landlord is liable for any irregularity." (The irregularities were after the seizure). Byles, J., notices the distinction "between matters done which are dehors the authority, such as taking fixtures or seizing goods in a different place from that to which the warrant addresses itself, and the case of any irregularity committed by the broker while acting within his authority."

In noticing *Freeman v. Rosher*, Williams, J., says, "The authority was to distrain 'goods,' and the broker distrained 'fixtures.'"

The expressions of the judges in this case lean strongly towards the general liability of landlords for bailiffs' acts. Cockburn, C. J., says: "Where a man authorizes another to do an act which involves certain things necessary to make it legal, he is bound to see that those things are properly done, otherwise he is responsible for the illegal acts of his agent."

At the same time there are authorities modifying and restraining the universality of this proposition. See, for instance, *Peachey v. Rowland* (13 C. B. 182).

In the case before us, however, we find the objection taken. Then we have the evidence of the defendant, speaking of his selling the distress. No question is asked him, and he says nothing to shew his non-complicity in the acts of his bailiff, and we apparently hear no more of the objection till the argument in Term.

We think, on such evidence, we should not be warranted in sending this case again to a jury, especially after the years of costly litigation between the parties, on this small claim, and that the rule to enter the verdict on the 4th count for \$150, the value of the sheep, must be made absolute. Had the question been formally submitted to the jury, there can be little doubt what their verdict must have been.

We wish to pronounce no opinion as to McLeans's lia-

bility, had he been fully exonerated from all sanction of Keller's acts. We are not satisfied that the point is fully concluded by authority.

Rule absolute to enter verdict for plaintiff, for \$150, on 4th count.

LEONARD V. THOMAS AND FRANCIS NORTHEY, EXECUTORS
OF GEORGE NORTHEY.

Breach of contract—Leave and license—Accord and satisfaction—Misjoinder—Pleading.

As an answer to the declaration, set out below, defendants pleaded (3rdly) that testator, and defendants, as executors, since his death, made all the variations from the plans and contracts in the declaration mentioned by the leave and license of plaintiff and his agent: *Held*, bad, among other reasons, because leave and license cannot be pleaded to a breach of contract.

5th plea, that, as to so much of the declaration referring to alleged imperfections of material and workmanship, after the occurrence thereof, and before suit, said boiler and engine were taken by plaintiff from defendants, as executors, whereby, and by force of the contract set out in the declaration, defendants ceased to be liable to damages in respect of the causes of action to which the plea was pleaded:

Held, good.

The 7th plea stated that after testator's contract and promise, it was agreed between him and plaintiff in his lifetime that he should not perform them, but instead testator should deliver to plaintiff, who was to accept, a different boiler and engine, larger and more valuable, requiring a longer time for construction, and afterwards, before action, testator in his lifetime, and defendants, as executors, did make and deliver to plaintiff, who accepted same upon such terms, and paid the price thereof:

Held, bad.

Held, also, declaration not bad for averring a promise by testator to perform the work and afterwards by defendants, as executors, to finish same, testator having died before time for completion expired.

THE declaration set out a contract by which the testator agreed to build and construct for plaintiff a marine boiler and steam engine, in accordance with plans and specifications (set out verbatim), giving dimensions as to the boiler and full description of all the work, to be made of a superior quality of iron, as agreed; boiler to be tested, and in every particular to be a good serviceable piece of work;

to pass inspection by Government engineer and inspector under the statute ; the contractor not to be liable for any mishap that might occur after the work was delivered on Great Western Railway at Hamilton ; that an engineer, Kielly, employed by plaintiff, would proceed from time to time to Hamilton to confer with, advise, and arrange the work ; drawings to be prepared in accordance with specifications, which might be revised by the mutual consent of the parties as the work progressed, provided it did not entail extra expense to contractor. Then followed specifications for the oscillating steam engine and boiler, describing the work minutely ; the engine to be in every particular made to the plan and other directions, as agreed between Kielly and the contractor, notwithstanding any errors and omissions in plans and specifications, and to be understood by all parties interested to be a good average job ; payment to be made as work progressed, as agreed on ; the contractor not to be liable for any fault or imperfection of material or workmanship after the engine, &c., were taken by Leonard from the contractor ; boiler and engine to be delivered to plaintiff on the Great Western Railway, at Hamilton, on 12th March, 1871 ; price to be \$2,700, of which \$1,000 paid to testator in his lifetime ; that testator entered upon the work and partially completed it, and died before completion, and before 12th March, 1871 ; whereupon defendants, as executors, in consideration of the premises, and of the payment by plaintiff of the residue of contract price which was paid to them, promised plaintiff to complete the work according to agreement, and did partially finish and complete boiler and engine, and did afterwards, but in an unfinished and imperfect state, deliver to plaintiff the same on the Great Western Railway, at Hamilton.

Averment of fulfilment of conditions, &c.

Breach, 1, that neither testator nor defendants, as executors, did deliver the same on 12th March, 1871, on the Great Western Railway, at Hamilton, nor till four months after ; 2, that neither of them, as aforesaid, would build

the boiler surface of sufficient quality of iron, as agreed, but refused so to do unless plaintiff would pay an extra \$600, which he was forced to pay, and paid to have them so done; nor furnish check-valves or taps, &c., &c.; nor do the work, &c., in order to make said work a good average job; that neither boiler nor engine was a good average job, for the reasons set forth.

The 3rd plea to the declaration stated that testator and defendants, as executors since his death, made all the variations from the plans and specifications and from the contracts in the declaration mentioned, and whereof plaintiff complained, by the leave and license of plaintiff and his agent, Kielly, in the declaration mentioned. This plea was demurred to.

The 5th plea was pleaded to so much of the declaration as referred to imperfections of material and workmanship, and averred that after the occurrence thereof, and before suit, the said boiler and engine were taken by plaintiff from defendants, as executors, whereby, and by force of the contract set out in the declaration, defendants ceased to be liable to damages in respect of causes of action to which the plea was pleaded.

This plea was also demurred to, chiefly on the ground that it did not appear from it that plaintiff took the boiler and engine, &c., in satisfaction or discharge.

The 7th plea averred that, after making the contract and promise by testator, it was agreed between him and plaintiff, in his lifetime, that testator should not perform his contract and promise in the declaration alleged, but instead thereof testator should make and deliver to plaintiff, and he accept, another, different, larger, and more valuable boiler and engine, which would necessarily require a longer time to construct, and afterwards, and before commencement of suit, testator in his lifetime, and defendants, as executors, since his death, did accordingly make, and defendants, as executors, did accordingly deliver to plaintiff, who then accordingly did accept and receive upon such terms, such so substituted boiler and engine, and pay the price thereof,

which were the supposed causes of action in the declaration alleged.

The 8th plea was to the same effect, confining the new arrangement wholly to the defendants as executors, omitting all mention of the testator.

Both these pleas were demurred to, on the ground, among others, that it was not shewn that plaintiff accepted and received the alleged new agreement and contract, or the alleged new and substituted boiler and engine, in full satisfaction and discharge of the promise of said Northey, and of the damages by him sustained by reason of the non-performance of the promise of said Northey set out in the declaration.

The declaration was objected to for misjoinder of causes of action accrued to plaintiff against testator in his lifetime, and against defendants, as executors, together with causes which accrued to plaintiff since the death against defendants personally.

S. Richards, Q.C., for the demurrers, and in support of the declaration, cited *Werner v. Humphreys*, 2 M. & G. 853; *Marshall v. Broadhurst*, 1 C. & J. 403; *Siboni v. Kirkman*, 1 M. & W. 418; *Wentworth v. Cook*, 10 A. & E. 42; *Dobson v. Espie*, 2 H. & N. 79; *Flockton v. Hall*, 14 Q. B. 380; *Edwards v. Chapman*, 1 M. & W. 231; *Meyer v. Dresser*, 16 C. B. 646; *Goss v. Lord Nugent*, 5 B. & Ad. 58; *Bayley v. Homan*, 3 Bing. N. C. 915; *King v. Gillett*, 7 M. & W. 55; *Hurlburt v. Thomas*, 3 U. C. R. 258.

R. Martin, contra, cited *Corner v. Shew*, 3 M. & W. 350; *Webb v. Cowdell*, 14 M. & W. 820; *Kingdom v. Nottle*, 1 M. & S. 355; *Sanders v. Baby*, 7 C. P. 252; *Foster v. Dawber*, 6 Ex. 839; *Young v. Austen*, L. R. 4 C. P. 553.

HAGARTY, C. J., delivered the judgment of the Court.

As to the 3rd plea, *Dobson v. Espie* (2 H. & N. 79) is an express decision that leave and license cannot be pleaded to a breach of contract. Martin, B.: "I can find no instance of a plea of leave and license to a breach of con-

tract. It is applicable to cases of torts, not to contract. If a party is relieved from the performance of his promise, the proper expression is, that he is exonerated or discharged. It is an abuse of language to call it leave and license."

But, apart from this, it is not easy to understand this plea as an answer to the declaration, which it professes to be. It does not answer the breach as to delay, nor as to refusing to make the boiler surfaces of sufficient quality of iron unless and until plaintiff paid \$600 extra therefor, nor for not making the work a good average job. It might be true that the variations were with plaintiff's assent, and yet the cause of action remain.

We think the plea is bad.

As to the 7th plea, it is framed in a most peculiar form, and it is not easy to understand what idea was in the pleader's mind. It is not said whether the new agreement was made before or after any breach or cause of action. Plaintiff charges that his boiler was not delivered at the appointed time, and sets out many breaches of contract as to material and workmanship. How are such statements answered by this plea? Defendants say that they made and delivered to plaintiff, and he accepted, a different, larger, and more valuable boiler than that first contracted for. If we were to read this plea as alleging a substituted contract before any breach of the first, then it is unintelligible to aver the making and delivery of a different boiler, &c., as an answer to complaints of the bad quality and character of a boiler, &c., under the first contract. What is the meaning of the allegation at the end, "which are the supposed causes of action in the declaration alleged?" There is no averment whatever that the substituted boiler, &c., answered the contract, or anything as to its quality or character. The boiler and engine actually made and delivered may have been open to all the complaints set out in the declaration. If we assume the new agreement to be before breach, it ought to have been pleaded, as laid down in *Dobson v. Espie*, in exoneration or discharge of performance, and then might be an answer to a non-delivery or to

a delivery after the appointed time. Here, whatever is meant by it, it professes to answer the whole declaration. If it is to be read as after breach, I think it bad as not averring an acceptance in satisfaction and discharge of the breaches or causes of action. Plaintiff may have accepted a different, larger, and more valuable boiler and engine without waiving his rights in other respects as to kind of boiler, &c., required.

There is a review of the authorities on this point in *Macfarlane v. Ryan* (24 U. C. R. 477,) and they need not be here repeated.

We think the plea is of that unintelligible and insufficient character that no plaintiff ought to be compelled to answer, reply to, or to risk joining issue on it.

We think the 8th plea is equally bad.

As to the 5th plea, the declaration shews that, as part of the contract, "the contractor was not to be liable for any fault or imperfection of material or workmanship after the engine, &c., is taken by Mr. Leonard (the plaintiff) from the contractor." The main objection urged to this plea is, that it does not shew that plaintiff took the engine, &c., in satisfaction or discharge, but I do not think it open to this objection. It seems merely to state the happening of an event on which the defendants' liability ceased. It confesses the cause of action, and avoids it by reference to this clause in the contract. The plaintiff had a good cause of action up to this event, then it ceased. It seems to us the plea is a good answer to that to which it is pleaded.

As to the declaration, we do not read it as disclosing any completed cause of action against testator. He is said to have entered on the work, partially completed it, and died before the day appointed for delivery. On a contract of this kind it seems clear that his estate would be liable for damages for the non-fulfilment, and, apart from authority, there seems no reason why it should not be charged, as here, that the executors, as such, in consideration of the payment by plaintiff of the residue of

the contract price, promised to complete the work. If this be not a promise binding them personally, we hardly see the force of the objection. If they really made the promise, and its legal effect be to create a personal liability, is it their part to object that plaintiff only charges them as executors?

In 2 *Williams* on Executors, 1791 (ed. 1867), it is laid down, "If the goods or work had been contracted for by testator, and the contract completed by plaintiff in the time of the executor, the declaration, instead of containing the common counts for goods sold to and work done for the executor, should state the contract to have been made with the testator, and that at the time of his death the work was incomplete but was finished afterwards, and the defendant, as executor, then promised to pay," citing *Werner v. Humphreys* (2 M. & G. 853, note *a*). This is the converse of the present case, but we can see no difference in the principle.

We refer to *Wentworth v. Cook* (10 A. & E. 46). Little-dale, J., says: "The personal representatives are bound, though not named, and are bound to pay damages out of the assets, if they do not take the contract on themselves." See also *Campanari v. Woodburn* (15 C. B. 405); *Powell v. Graham* (7 Taunt, 580); *Dowse v. Cox* (3 Bing. 20).

Corner v. Shew (3 M. & W. 350), cited by Mr. Martin, does not, we think, help him. It was on the common counts; that defendant, as executor, was indebted for goods sold to defendant, as executor, and for money had for use of defendant, as executor, at his request, and for money found due from defendant, as executor, on account stated. There was held to be a misjoinder. Parke, B., says: "The two first counts are necessarily for debts due from defendant in his own right."

Marshall v. Broqdhurst (1 Cr. & J. 403) seems in point. "If a party contract for himself and his executors to build a house, and dies, the executors must go on or they would be liable to damages for completing the work. If they go on, it is work and labour done by them as executors;

they may recover as executors, and the money, when recovered, will be assets in their hands. Suppose a party to have engaged to build a house, and to have procured all the necessary materials, in the event of his death may not the executors complete the work, or must they dispose of the materials at a loss to the estate?"

We think the declaration is good.

*Judgment for plaintiff on demurrers to
3rd, 7th, and 8th pleas, and for
defendant on 5th plea.*

IRWIN V. THE CORPORATION OF BRADFORD.

*Highway—Liability to repair—Venue—Defect on face of record—Arrest of
judgment—Nonsuit.*

By 9 Vic. ch. 38, sec. 23, the road in question, for an injury resulting from the disrepair of a portion of which, passing through defendants' incorporated limits, they were sought to be made liable, was placed under the control and management of the Board of Works, and by 13 & 14 Vic. ch. 15, Government had power to divest the Board of Works of such control by proclamation in the "Provincial Gazette," whereupon the road again became under the control and management of the local municipalities in which it was situate. In 1851 the County Council by by-law assumed the road under the Municipal Corporation Act, and kept it in repair until 1838, when they repealed the by-law. From that time down to the occurrence of the accident which caused the injury complained of, a period of twelve years, the defendants undertook the duty of repairing the road which was within their limits.

Held, that it was to be presumed that the board of works had been in due form of law divested of all control and management of the road, and that the piece in question had properly passed under the jurisdiction of the defendants, and that they were bound to keep it in repair.

Held, also, that defendants were not entitled either to nonsuit plaintiffs or arrest the judgment, on the ground that the venue was improperly laid, as, this being an objection patent on the face of the record, they should have demurred to the declaration.

THIS was an action to recover damages for injuries sustained by the plaintiff in consequence of the disrepair of a portion of a public road running through defendants' incorporated limits.

The declaration alleged that defendants were possessed of a certain road, street, or public highway, within the corporate limits of the village of Bradford, which road was under their jurisdiction, &c., &c.: that defendants suffered the road to be obstructed and out of repair, &c., and plaintiff, lawfully driving on the road, was thereby injured, &c.

Pleas, 1, not guilty; 2, that defendants were not possessed of said street or highway, and same was not under their jurisdiction, &c., as alleged; 3, injury not within three months.

Issue.

The venue in the margin of the declaration was the county of York, Bradford being an incorporated village in the county of Simcoe.

The case was tried at the Toronto Assizes, before Gwynne, J.

It was proved that plaintiff was injured as alleged by the defective state of the road, and the verdict was in his favour for \$1,500.

At the trial, three questions were raised: 1st, as to the venue; 2nd, that the road was not a public road vested in the municipality; 3rd, that the road was not shewn to be within defendants' corporate limits. Leave was reserved to move to enter a nonsuit on these grounds.

In Easter Term last, *Harrison*, Q.C., obtained a rule on the leave reserved, or to arrest the judgment, the action being local, and the venue being improperly laid in York.

M. C. Cameron, Q. C., shewed cause, citing *Ferguson v. Howick*, 25 U. C. R. 547; *Harrold v. Corporation of Simcoe*, 16 C. P. 43.

Harrison, contra, cited *Dance v. Burrowes*, 10 C. P. 172.

HAGARTY, C. J.—I shall deal first with the point as to jurisdiction.

The village of Bradford was incorporated in 1859 by statute 20 Vic., ch. 98, and the county surveyor (Creswick) testified that the piece of road where the damage was

done is within the limits prescribed by that statute. It is part of the main road called the West Gwillimbury road, and was apparently assumed or held by the Crown, at all events to 1851, at which time it was assumed as a county road by the county of Simcoe; and in 1858, the year after the defendants' incorporation, the County Council passed a by-law repealing the by-law of 1851, and declaring that it shall be in the power of the municipalities through which the road passes to assume the same. The county surveyor swore that this road was under his control to 1858, but not since then. It was shewn that defendants had done work on the road.

For the defence it was proved that Bradford had never passed a by-law assuming the road, but that the corporation had done work on the road from time to time, almost every year.

The jury found, 1st, That the "snag" in the road, which caused the injury, was within defendants' limits; 2nd, That defendants had, since the incorporation, been in the habit of doing repairs on the road; and 3rd, That this "snag" was not on the approach to the bridge (which is common property), but is within defendants' limits; and other matters as to the accident.

By 9 Vic., ch. 37, sec. 23, this road was declared Crown property, under the Board of Works, with a clause empowering a transfer, on certain conditions, to the District Council, from which time the council could pass by-laws for the management thereof, and as to the tolls, &c.

We find, in 1851, a by-law of the County Council assuming this road, and from that time to 1858 repairing it. In the year 1858, following that in which Bradford was incorporated (1857), we find the county repealing this by-law, and allowing the several municipalities through which the road passed to assume it. From that time down to the happening of this accident, a period of twelve years, we find these defendants apparently assuming the duty of repairing the road within their limits, and, beyond proving that they had passed no by-law actually assuming the

road, they have given no evidence to shew any intervention of any other authority or jurisdiction in any other person or body. I think we are bound, on this evidence, to assume the lawful transfer of this road, in the first place, to the county of Simcoe. We then find that body withdrawing from all interference or control, and, for twelve years, the road wholly controlled and repaired by defendants. Then we find the general statutable obligation of secs. 338, 339 of the Municipal Act, that every street, road, &c., in a city, township, town, or incorporated village, shall be kept in repair by the corporation. I do not consider that the proviso excluding its operations from roads, bridges, &c., laid out without the corporation's establishing and assuming it by by-law, applies to this, the main road, on each side of which the village was first laid out.

It was urged to us that, on the decision of this Court in *Regina v. Brown and Street* (13 C. P. 356), and *St. Catharines v. Gardner* (20 C. P. 107, and in Appeal, 21 C. P. 190), the portion of the road lying within a subsequently incorporated village would not become the property of the corporation, nor would they be liable to repair.

I think those cases were rightly decided on the grounds there stated, but that they cannot govern this case. There, there was an existing road vested in a joint stock company, levying tolls on its road, and the contest was with a subsequently created municipality, in the latter case claiming that the portion of the road within their limits should be held their property, to exclude the joint stock company's right to levy tolls, &c.; in the other, the contest was as to the liability to repair.

To place the case before us on the same grounds, there should, I think, be some existing company or power in whom we could see the road was actually vested, or who set up any claim to a jurisdiction over it, or to whom the public could turn to seek redress for injuries for non-repair. All this is wanting. It is the main public highway passing through Bradford, one to which I think the statutable obligation to repair attaches, unless defendants could shew

affirmatively there was some other body or power liable therefor. This, I think, they have failed to do.

In *Harold v. The Corporations of York and Simcoe* (16 C. P. 50), this Court held that, independently of the statute, there was a clear common law liability on defendants to repair a bridge within their jurisdiction, and for the doing of such repairs they had full powers to levy rates. See the same case in Appeal (18 C. P. 9) where the same view is adopted.

As to venue. The action is local, and I think we are bound, on the face of the record, to know that the village of Bradford, incorporated under the public Act 20 Vic., ch. 109, is in the county of Simcoe. The defendants, therefore, could have demurred to the declaration: *Clayton v. Best* (8 L. T. N. S. 502).

It seems clear that they cannot move in arrest of judgment, because the statute 16 & 17 Car. II. ch. 8, enacts that after verdict judgment thereupon shall not be stayed or reversed, for that there is no right venue, so as a cause were tried by a jury of the proper county or place where the action is laid. It has been held that the proper county or place means where the venue is actually laid, not where it ought to have been laid: *Bailiffs of Lichfield v. Slater* (Willes, 433).

In *Ferguson v. Township of Howick*, in appeal from the County Court, (25 U. C. R. 552), the action was local, and the objection patent on the record. The Court said: "If the suit were in a Superior Court, we are of opinion that if defendant had omitted to demur he could not insist on a nonsuit, and after verdict he could not arrest judgment, the objection being cured by the statute."

As the objection here appears on the declaration, there was no variance between allegation and proof, as in *Richardson v. Locklin* (11 Jur. N. S. 951; 12 L. T. N. S. 728; 6 B. & Sm. 777). There the venue was in Surrey, for wrongfully altering, &c., a public footway, with no local description. It appeared in evidence that the footway was in Essex, and plaintiff was nonsuited. The Court

upheld the nonsuit, on the ground that the margin venue of Surrey is imported into the declaration, which therefore avers a footway in Surrey, and "that being a material averment, a variance is raised by the plea between the allegation and the proof." The judgment assumes there was a plea traversing that there was such a footway.

Boyes v. Hewetson (2 Bing. N. C. 575) was somewhat similar, the objection not appearing on the record, and no plea as to the locality of the land; there was a motion for nonsuit, and a verdict by consent, subject to award of a barrister, to find subject to this objection. The judgment of Tindal, C. J., enters fully into the question, and he decides there could not have been a nonsuit on the objection. As this case has been fully discussed in *Ferguson v. Township of Howick*, with many other authorities, we need not repeat the argument.

The result is that, where the objection is patent on the record, the defendants, if they do not demur, cannot either nonsuit the plaintiff or arrest the judgment.

I think the rule must be discharged.

GWYNNE, J.—As to the point of venue, I concur in thinking, with the learned Chief Justice, that, inasmuch as the objection appears upon the record, and that the declaration was open to a general demurrer, the defendants have, for the reasons stated by the Chief Justice, deprived themselves of the right of now objecting upon that point. As to the other point, it appears that by the Statute 6 Wm. IV. ch. 28, certain persons were appointed commissioners for expending a sum of money in making and keeping in repair the bridge and road leading from Yonge Street, near the Holland Landing, through part of West Gwillimbury to Evan's Tavern in the said township, upon which public money had before been expended. It was stated in evidence that Evan's Tavern, here named, was in what is now the Village of Bradford. By 4 & 5 Vic. ch. 28, passed in 1841, certain sums of money were appropriated for public improvements, and among those "for improving and completing the main

northern road from Lake Ontario, at Toronto, to Lake Huron, continuing and perfecting the same from the portion already undertaken by the district of Barrie, establishing toll bars thereon, and improving sundry parts thence to Penetanguishene, and on the Coldwater Portage—£30,000. By reason of the error herein, of calling the district of Simcoe the district of Barrie, and for the purpose of correcting that error and of defining more particularly the roads to be improved, an Act was passed in 1845, 8 Vic., ch. 75, whereby it was enacted that the said sum of £30,000, or so much of it as was then expended, should be unexpended in improving and completing the main northern road from Lake Ontario at Toronto, to Lake Huron, continuing and perfecting the same from the termination of the portion already macadamised by the Home District, establishing toll bars thereon, and improving sundry parts thence to Penetanguishene, and in improving the Coldwater Portage, and also in improving the road from Bond Head to Barrie, and in draining, forming and grading that part of the Penetanguishene road from Bradford, through West Gwillimbury and Innisfil, to Barrie, in the district of Simcoe, in such manner as to the Board of Works should seem advisable; and the money was to be given out and expended under the direction of the Board of Works; but as yet these works were not vested in the Board of Public Works. This purpose was effected by 9 Vic. ch. 37. Among the works so vested is “the main north road from Toronto to Lake Huron, at Penetanguishene, except such portions as should from time to time be exempted by proclamation from the operation of the Act.” Upon the passing of this Act the commissioners, having control of the road which, by 6 Wm. IV. ch. 28, was authorized to be put in repair with the funds provided by that Act, were relieved of their duties, and that piece of road was assumed by the Board of Works as forming part of the “main north road.”

By 13 & 14 Vic., ch. 15, sec. 2, it was enacted that any public road or bridge made, built, or repaired at the expense of the Province, and then under the management and con-

trol of the Commissioners of Public Works, might, by proclamation of the Governor, issued by, and with the advice of, the Executive Council, be declared to be no longer under the management and control of the said Commissioners, and upon, from and after the day to be named in such proclamation such road, or bridge, shall cease to be under the management and control of the Commissioners, and no tolls shall be levied thereon under 12 Vic. ch. 4, but such road or bridge shall be under the control of the municipal authorities of the locality, and the road officers thereof. At the time of the passing of this Act the whole of the township of West Gwillimbury was, by force of 8 Vic. ch. 7, A.D. 1845, situate in the County of Simcoe, and was bounded on the east by Yonge Street. When, therefore, the by-law No. 12, produced in evidence, was passed on the 20th June, 1851, "to establish as a public road a certain survey made by the surveyor, Harry Creswick, under the instructions of the Commissioners of the County, leading from Holland Landing to Bond Head," the whole of the road was situate within the County of Simcoe. The by-law describes the road as commencing at the distance of five chains and fifty links southerly of the north east angle of No. 108, on the west side of Yonge Street; thence (according to various courses stated) two miles, sixty-seven chains and eighty-six links, to the east side of the bridge situate upon the westerly part of lot No. 20, in the second concession of the old survey of the township of West Gwillimbury. This bridge was spoken of in evidence as the bridge across the Holland River; thence north $70^{\circ} 30'$, west thirteen chains thirty-three links, more or less, to the rear of the said second concession. This terminus, it was said, reached the point in the present Village of Bradford where Evan's Tavern formerly stood.

By the Municipal Institution Act, 12 Vic. ch. 81, sec. 27, A.D. 1849, it had been provided that, "whenever any new or existing highway, road, street, bridge, &c., within any township shall, by any by-law of the Municipal Council of the County in which such township is situate, be assumed

by such Municipal Council as a County road or bridge, as one in which more than one township or the whole County is interested, it shall be the duty of such Municipal Council and they are hereby required, with as little delay as reasonably may be, and at the expense of the County, to cause such road to be planked, gravelled, or macadamized, and such bridge to be built in a good and substantial manner.

The road assumed by the by-law would seem to have been at the time of the passing of the by-law in a bad state of repair, for it was stated in evidence that immediately upon the assumption of the road as a County road it was planked by and at the expense of the County. On the 2nd of August in the same year, 1851, by 14 & 15 Vic. ch. 5, it was enacted that "the lots on Yonge Street, in the present township of West Gwillimbury, shall be detached from the said township, and be annexed to and form part of East Gwillimbury, and the residue of that part of the said township of West Gwillimbury, which lies on the south east side of the west branch of the Holland River, shall be detached from the said township of West Gwillimbury and be annexed to, and form part of, the township of King." By the same Act it was declared that the township of West Gwillimbury should be in the County of Simcoe, and that the townships of East Gwillimbury and King should be in the County of York. The effect of this Act was to transfer to the County of York the two miles, sixty-seven chains and eighty-six links of the road mentioned in the said by-law No. 12, extending from lot 108 on Yonge Street to the east side of the bridge across the Holland River; to place that bridge, in virtue of 12 Vic. ch. 81, sec. 39, under the jurisdiction and control of the Counties of York and Simcoe, jointly, and to leave only the distance of twelve chains or thereabouts, extending from the west side of the bridge, in the County of Simcoe, and under the operation of the by-law. This portion of the road the County Council maintained and kept in repair until the by-law 86 was passed October 7, 1858. What arrangement may have been made between the Counties of York and Simcoe with respect to that portion

of the road so transferred to the County of York, was not explained, nor is it important that we should know. It was objected, upon the authority of *St. Catharines Road Co. v. Gardner*, that the by-law No. 12 was inoperative, as the piece of road therein described was part of the main north road, and under the control of the Board of Works, and it was contended that, as no direct evidence was given of any transfer from the Board of Works to the Municipalities, it is still under the control of the Board, and that, therefore, no Municipality is liable for its falling into bad repair; but when we find the County Council in 1851 passing a by-law to assume the road, which I do not well see how it could do if the road was then under control of the Board, and when we find it, in pursuance of the by-law, planking the road and putting it in repair, and bearing the expense of maintaining in repair that portion which the Act 14 & 15 ch. 5, left within the limits of the County of Simcoe, continually for the space of seven years, until the by-law of October, 1858, was passed, and when we find the Municipality of the Village of Bradford, which was incorporated by special Act in 1857, continuously since the passing of the by-law of October, 1858, repairing the same piece of road with the public moneys of the Village corporation, we can, I think, have no difficulty in presuming that before the passing of the by-law of 1851, this piece of road therein described had been, under the provisions of 13-14 Vic., ch. 15, removed from the control and management of the Board of Works and placed under the control of the municipal authorities of the locality; and so that it was competent for the County Council to assume the liability, which it did assume by the by-law, and in like manner to relieve themselves from the liability so assumed. I am therefore of opinion that upon the passing of the by-law No. 86, this piece of road, where the accident which caused the damage to the plaintiff which is complained of, occurred, came under the management and control of the Village of Bradford, which municipality was bound thenceforth to keep it in repair and liable for its being out of repair. The duty

thus imposed upon the Village Municipality the jury has found that they have in fact assumed, and as the jury further has found that the damage sustained by the plaintiff is attributable to the road having been negligently out of repair, the verdict rendered in his favour must stand.

GALT, J., concurred.

Rule discharged.

WALLBRIDGE V. EVERITT.

Deed of land—Covenant for quiet enjoyment—Construction—Whether restricted or general.

Held, on demurrer to the declaration set out below, and following *Austin v. Ferguson*, 25 U. C. R. 270, that the covenant for quiet enjoyment and freedom from incumbrances contained in the ordinary statutory deed for the conveyance of land is not controlled by the restrictive words preceding the earlier covenants.

THIS was an action against the defendant (Robert John Everitt, executor,) charging that one John Everitt, the testator, by deed dated 3rd June, 1862, in consideration of £1200, bargained and sold to plaintiff, his heirs and assigns, certain land (describing it), and in and by said indenture did covenant, promise, and agree to and with the plaintiff, his heirs and assigns, that he, the said John Everitt, at the time, &c., notwithstanding any act, &c., by the said John Everitt done, or committed, or knowingly, or wilfully suffered or permitted, &c., then was and stood solely, rightfully, and lawfully seised of a good, sure, perfect, absolute, indefeasible estate of inheritance, in fee simple, of and in said lands; and also that the said John Everitt, for and notwithstanding any act, deed, &c., as aforesaid, then had in himself good right, full power, and lawful and absolute authority to bargain and sell the said land to the plaintiff, his heirs and assigns, in manner and form aforesaid, and that it should and might be lawful for the plaintiff, his heirs and assigns, peaceably and quietly to

enter into, have, hold, &c., without the let, suit, hindrance, &c., of the said John Everitt, his heirs and assigns ; and that free and clear from all arrears of taxes, &c., and of and from all former conveyances, mortgages, judgments, executions, &c.; and all things happened to entitle the plaintiff to maintain this action ; yet, at the time of making the said indenture, there were taxes and assessments due, in arrear, and unpaid, viz., \$100, which the plaintiff was compelled to pay, and did pay ; and further, that whilst the title to said land, and the fee simple, was vested in one Robert John Everitt, who before then had conveyed to said John Everitt, in fee, and said John Everitt had no title to said land otherwise than under said deed from said Robert John Everitt, one John Bell impleaded said Robert John Everitt in the County Court of Hastings, and recovered a judgment against him, which was entered 19th December, 1859, which was at the time of the conveyance from John Everitt an incumbrance upon said land, and at the time of the conveyance by said John Everitt to plaintiff, said John Bell had then filed his bill in Equity upon said judgment against the plaintiff for a sale of said land to satisfy said judgment, which plaintiff was obliged to pay : *averment*, that said John Everitt did not keep his covenant for freedom from incumbrances, but broke same by reason of said judgment.

Demurrer, 1. There was no breach of the covenant for quiet enjoyment against incumbrances stated or shewn in the declaration, for there could be no breach of it without an eviction, and no eviction was alleged ; 2. The covenant was not that the land was free from incumbrances, but that it should and might be lawful for plaintiff, his heirs and assigns, peaceably and quietly to enter into, have, hold, &c., without hindrance, interruption, &c., and it was not alleged that the plaintiff had not so held, &c., nor was it alleged that there had been any such hindrance, &c.

J. K. Kerr, for the demurrer, cited *Shire v. Gates*, 21 U. C. 419 ; *Brunskill v. Wilson*, 25 U. C. 248 ; *Hind v. Marshall*, 1 B. & B. 319 ; *Hesse v. Stevenson*,

3 B. & P. 565; *Austin v. Ferguson*, 25 U. C. 270; *Wilson v. Brooke*, 2 U. C. 437; *Trust and Loan Co. v. Covert*, 30 U. C. 239; *Harry v. Anderson*, 13 C. P. 476; *Carpenter v. Parker*, 3 C. B. N. S. 206; *McCallum v. Davis*, 8 U. C. 150; *Sugden*, V. & P. 14th ed., 606, 609; *Rawle*, Covenants, 3rd ed., 506; *Platt*, Covenants, 358.

Wallbridge, Q. C., contra, cited *Howes v. Brushfield*, 3 Ea. 491; *Allen v. Hopkins*, 13 M. & W. 94, Am. ed., 103, Note; *Crossfield v. Morrison*, 13 Jur. 565; *Haynes v. Smith*, 11 U. C. 57; *Hughes v. Bennett*, Cro. Car. 495; *Sugden*, ed. of 1857, 469.

HAGARTY, C. J., delivered the judgment of the Court.

The principle on which we must construe the effect of this covenant is, we think, settled by the case of *Austin v. Ferguson* (25 U. C. 270).

We had occasion to look fully into the authorities up to that decision (1866), and no authority of a later date has been cited. The covenants here are almost identical in form with those in *Austin v. Ferguson*.

We consider the covenant for quiet enjoyment and freedom from incumbrances is not controlled by the restrictive words which precede the earlier covenants. This construction disposes of the general objection to the sufficiency of the declaration. In this view it is unnecessary for us to consider whether the plaintiff, in evidence, can support the allegations in the second breach.

Judgment for plaintiff.

FARRELL V. O'NEILL.

Insolvency—Schedule of debts—Pleading.

To an action of covenant in a mortgage to pay money, defendant pleaded that, becoming insolvent after execution of the mortgage, he made an assignment; that plaintiff's claim was known as that of the "Wood Estate," and was so described in the schedule submitted to the assignee and creditors; that plaintiff resided abroad, and was represented in Canada by M., who had notice of the appointment of said assignee; that on the expiry of a year defendant obtained his discharge absolutely, by which he was discharged from plaintiff's claim.

Replication, that the order for discharge was made before 1st September, 1869, and that plaintiff's name was not mentioned as creditor in any schedule, and his claim was never proved against defendant's estate.

Rejoinder, that plaintiff's claim was known as that of the "Wood Estate" (plaintiff representing and being entitled to said estate) and was so entered in the schedule filed by defendant with assignee, and that plaintiff was represented by M., who had notice, &c.

Held, on demurrer, rejoinder good.

King v. Smith, 19 C. P. 319, distinguished.

ACTION on covenant in a mortgage, dated 12th September, 1857.

Plea, that defendant, after making said deed, being insolvent, and desirous of making an assignment, called a meeting of his creditors, and assigned to one Donovan, for the benefit of creditors; plaintiff's claim was known as the "Wood Estate," and was mentioned as such in a schedule of assets and liabilities of the defendant submitted to the said assignee and to the said meeting; that plaintiff resided in England, and was represented here by Messrs. Mowat & Maclellan, who had notice of the appointment of the said assignee; that after the lapse of a year defendant applied for and obtained his discharge absolutely, by which he was discharged from the plaintiff's claim.

Replication, that said order was made before 1st September, 1869, and that plaintiff's name was not mentioned as a creditor of defendant in any schedule of creditors of defendant, and plaintiff's claim never was proved against the estate of defendant.

Rejoinder, that plaintiff's claim was known as the claim of the "Wood Estate," plaintiff being the party

representing and entitled to said estate, and was so entered in a schedule of assets and liabilities filed by defendant with the assignee, and that plaintiff was represented by Messrs. Mowat & McLennan, who had notice.

Demurrer, 1. Said rejoinder no answer to replication. 2. No compliance with the Insolvent Act, as regarded plaintiff's debt, shewn by said rejoinder. 3. Merely a repetition of the plea.

James McLennan, for the demurrer, cited Insolvent Act of 1864, sec. 2; *King v. Smith*, 19 C. P. 319; *Cameron v. Holland*, 29 U. C. R. 506; *Romelio v. Hallaghan*, 1 B. & S. 279; *Booth v. Coldman*, 1 E. & E. 414.

M. C. Cameron, Q.C., and *Foy*, contra, referred to *Foreman v. Drew*, 4 B. & C. 15; *Wood v. Jowett*, 4 B. & C. 20.

MacLennan, in reply, cited *Byles*, Bills, last ed., 415.

GWYNNE, J., delivered the judgment of the Court.

It is quite a mistake to suppose that our judgment in *King v. Smith* (19 C. P. 319) is decisive of this case. True it is that the replication in this case appears to be taken *verbatim* from that in *King v. Smith*, but in that case neither the debt nor the creditor's name, nor anything to indicate the liability, was entered in the insolvent's schedule. *King v. Smith*, in effect, decided that the defendant's plea was bad, because it did not profess to shew that the plaintiff's claim then in suit came within that class of the insolvent's debts as an exemption from liability in respect of which the statute declares that the discharge should operate. Our statute gives no short form of plea similar to that in *Bullen and Leake*, 518, which is expressly given by 1 & 2 Vic., ch. 110, sec. 91. Where a defendant, therefore, seeks to avail himself of the exemption from liability which a discharge obtained under the Act gives, he must, in his plea, bring the debt sued for within the exempted class: *Leonard v. Baker* (15 M. & W. 202); *Phillips v. Pickford* (14 Jur. 272); *Stephenson v. Green* (11 U. C. 452); *Beck v. Beverley* (11 M. & W.

845). Now, in the case before us, the defendant does plead for the purpose of shewing that he does bring himself within the protection of the Act in respect of the demand now in suit, for he alleges that the debt was entered in his schedule, and he states the terms in which it was so inserted, and he adds that the plaintiff, as the party entitled to recover payment, was notified through his agents in this Province, he himself being resident abroad, of the assignment, and was required to prove his debt; and so the question here is not, as in *King v. Smith*, whether an insolvent, on getting a discharge, obtains exemption from a debt in respect of which neither the debt itself nor the creditor entitled to payment of it was at all mentioned in the schedule, but whether the manner in which this debt was set out in the schedule was sufficient to entitle defendant to exemption from liability at the suit of the creditor to whom the debt was payable.

By Imperial Statute, 1 Geo. IV., ch. 119, sec. 6, it was enacted that the insolvent should deliver to the Court a schedule containing a full and true description of *all and every person and persons* to whom such prisoner shall be then indebted, or who, to his or her knowledge or belief, shall claim to be his or her creditor, *together* with the nature and amount of such debts and claims respectively, distinguishing such as shall be admitted from such as shall be disputed. By the 16th section of that Act it was enacted that the Court, in the order for discharge, should specify the several debts of the insolvent to which the discharge should apply. Now, in *Formen and Fothergill v. Drew* (4 B. & Cr. 15), a case which arose under that statute, it appeared that the insolvent in his schedule entered the following liability: "1820-1821. Mr. Thomas Webb, Pillgwenlly, Newport, Monmouthshire, £82 admitted for coals. He holds a bill of exchange drawn by Mr. Norris upon, and endorsed by me—date and other particulars I cannot state." The description of the debt in the order of discharge was similar to that contained in the schedule. The plaintiffs were coaldealers, and they

were suing as endorsees of two promissory notes, one for £65 5s., made by one Norris, payable to the defendant, and by him endorsed to the plaintiffs; the other for £16 17s. 6d., made by the defendant, payable to Thomas Webb, and by him endorsed to the plaintiffs. These notes were handed to Webb, who in fact was plaintiffs' agent, for coal sold and delivered by the plaintiffs, as the Argood Coal Company, to the defendant. It was contended that the plaintiffs could not, in the words of the statute, be barred by a discharge relating to the entry in the schedule of a debt due to Thomas Webb. Abbott, C. J., giving judgment, said that the true question was whether the schedule contains a description of the debt sufficient to excite the attention of the creditor if he had read it; and it was held that there being no evidence to shew that the defendant had any intention to mislead the creditors, and the mode in which the debt was described being calculated to notify to the plaintiffs that the defendant sought to be discharged in respect of their debt, the provisions of the Act were sufficiently complied with, and that the defendant was discharged as to the debt.

In *Wood v. Jowett* (in a note, 4 B. & Cr. 20), a case arising under the same statute was left to the jury, with a direction that if they believed that the debt described in the schedule was not intended to describe the debt sued for, or that it was inaccurately described, with intent to deceive or mislead, or that it had in fact deceived or misled any of the defendant's creditors, to find their verdict for the plaintiff; but if, on the contrary, they believed the debt described in the schedule was intended for the debt in question, and that the variance was a mere mistake, without any evil intention or injurious effect, then to find for the defendant. The jury found for the defendant. Upon a motion to set aside this verdict, upon the ground that the debt for which the plaintiff was suing was not duly described in the schedule, the Court held that, as the description of the debt in the schedule was not intended to mislead, nor could have the effect of misleading, the

creditor, it was sufficient; and it was said that the plaintiff, being informed by the plea that the defendant intended to insist upon his discharge, he had it in his power to prove, if the fact were so, that he had been misled by the schedule.

Mr. Justice Morrison, in *Cameron v. Holland* (29 U. C. 506), has collected and reviewed several cases decided in England upon the various statutes from time to time in force there of a nature kindred to our Insolvent Act of 1864.

The 2nd section of that Act enacts and directs that at the first meeting of creditors the insolvent shall exhibit statements shewing the position of his affairs, and particularly a schedule containing the names and residences of all his creditors, and the amount due to each, distinguishing between the amounts that are overdue, or for which he is directly liable, and those for which he is only liable indirectly as endorser, surety, or otherwise, and which have not become due at the date of such meeting; and also the particulars of any negotiable paper bearing his name, the holders of which are unknown to him; also the amount due to each creditor. Then the 9th section, sub-sec. 3, which is the only section which declares what the operation and effect of a discharge shall be, says that it shall absolutely free and discharge the debtor from *all liabilities whatsoever* (except as hereinafter specially excepted) existing against him, and provable against his estate, *which are mentioned and set forth in the statement of his affairs annexed to the deed of assignment, or which are shewn by any supplementary list of creditors furnished by the insolvent previous to his discharge, and in time to permit the creditors therein mentioned obtaining the same dividend as other creditors upon his estate, or which appear by any claim subsequently furnished to the assignee.* The effect of this section appears to be that the discharge shall bar all creditors whose debts are so identified by the schedule or supplementary list that the creditor may obtain the same dividend as other creditors. The 6th section, sub-sec. 2, provided that a copy of the list of creditors,

produced at the first meeting of creditors, should be appended to the deed. So that, taking all these sections together, what the Act declares that the discharge shall operate upon is, "all liabilities whatsoever, &c., which are mentioned and set forth in the statement of the insolvent's affairs as appearing on the list of creditors produced at the first meeting of creditors, or which are shewn by any supplementary list," &c., &c.

The 11th section of the Act of 1864 provides that notices of meetings of creditors, and all other notices required to be given by advertisement without special designation of the nature of notice, shall be published as in the Act directed, "and in any case the assignee or person giving such notice shall also address notice thereof to all creditors, *and to all representatives of foreign creditors within the Province.*"

This section recognizes and affirms the authority of notices served upon the agent within the Province of a foreign creditor, that is, of a creditor residing abroad.

Now, the plea alleges that the particular debt for which the plaintiff is now suing was known as the claim of the "Wood Estate," and was entered as such in the schedule of liabilities exhibited by the defendant at the first meeting of his creditors, and that the plaintiff resided in Great Britain, and was represented in this country by certain persons as his agents, who were notified of the appointment of an assignee of the insolvent's estate, and were required, as such agents, to prove the plaintiff's claim.

This plea must, we think, be construed as alleging that the claim had acquired a name or reputation, or that it was known to the insolvent's creditors as the claim of the "Wood Estate," and further, that the plaintiff, as the holder of the claim, was notified of the assignment, and required to prove his claim in the proceedings in insolvency. The replication to this plea, disregarding the allegation in the plea, asserts in answer, nevertheless, to the plea, that the plaintiff's name was not mentioned as a creditor of the defendant in the list of creditors annexed to the deed

of assignment, or in the list produced at the first meeting of creditors, nor in any supplementary list, &c., and that the plaintiff's claim was not proved in the proceedings in insolvency. The effect of these two pleadings taken together is to raise upon the part of the plaintiff the contention that, although the plaintiff's claim was known, as alleged in the plea, as the claim of the "Wood Estate," and although the plaintiff, as the holder of that claim, was, through his representatives in this country, he being resident abroad, notified of the assignment, and required to prove the debt, yet that plaintiff's name was not inserted in the list as a creditor, and that that neglect neutralizes the defendant's discharge, and prevents its being effectually set up against this suit. To this replication the defendant rejoins, repeating, as alleged by him in the plea, namely, that the claim of the plaintiff stated in the declaration was known as the claim of the "Wood Estate," the plaintiff being the person representing and entitled to the said estate; and that, in the schedule of liabilities filed by the defendant with the assignee, the plaintiff's claim was stated as follows: "due to the Wood Estate, by mortgage, say \$8,000;" that the plaintiff was represented in this country by two gentlemen, naming them, residing in the city of Toronto, as his agents, who, as such, were duly notified of all the meetings of creditors, in accordance with the provisions of the Insolvent Act of 1864; and so the defendant says that plaintiff's claim was stated in the schedule of claims furnished by defendant, and was sufficiently designated to entitle defendant to be discharged therefrom by the discharge set out in the plea.

The plaintiff demurs to this rejoinder, upon the ground that it is but a re-assertion of the plea, and that it is no answer to the replication. Now, although we think a defendant ought, in his plea, to set forth all matters upon which he rests as shewing him to be entitled to plead his discharge in bar of the plaintiff's claim, yet the plaintiff, having replied as he has done here, the defendant, although re-asserting in his rejoinder the substance of his plea, will

be entitled to judgment on the whole record, if we should think the rejoinder offers matter upon which an issue in fact, being taken and found for the defendant, would entitle him to a verdict, notwithstanding the literal truth of the allegations in the replication, or if we should think the replication itself no sufficient answer in law to the plea.

Now, the rejoinder here adds to the matter in the plea by shewing the terms in which it was said the plaintiff's claim is entered in defendant's schedule, and we find there an amount stated, and also the nature of the liability, namely, a mortgage security. Why the plaintiff, who appears to have been known to be the holder of the claim, was not entered, it is difficult to understand, unless it be attributable to inadvertence. However, a name is mentioned, viz., the "Wood Estate." Now it is alleged that by this name the claim was known, and, besides what is alleged in the plea, that the plaintiff, as the holder, was notified of the assignment, and was required to prove the claim in the insolvency, it is alleged that he, through his representatives, was notified, as a creditor representing this Wood Estate claim, of all the meetings of creditors. This rejoinder, being demurred to, admits the facts, and raises the bare legal contention asserted in the replication, that the omission of the plaintiff's name from the schedule neutralized all the matters alleged by defendant, and rendered the discharge inoperative against the plaintiff's claim.

If this contention should be permitted to prevail, we think we should be putting a most narrow and illiberal construction upon the statute, and such as, we think, was never anticipated by the Legislature; namely, that a creditor, whose debt was inserted in the schedule, but whose name was negligently omitted, and who was notified of all the proceedings in insolvency, and who was called upon to prove his debt, and to take the benefit of the assignment, should purposely hold back or retain the benefit of his real security, and, after the insolvent had procured his discharge, supposing the plaintiff to be intending to rely upon his *real* security only, seek to enforce his claim per-

sonally against the discharged insolvent upon a covenant contained in the mortgage. This is in substance the plaintiff's contention, and, upon the authority of *Cameron v. Holland*, and the cases there cited, we do not think it can prevail. We are of opinion that, unless the plaintiff can raise an issue, and shall obtain a verdict of a jury in his favor, upon questions somewhat similar to those submitted to the jury in *Wood v. Jowett*, the defendant's discharge should operate to bar the plaintiff's claim. Upon this record, therefore, judgment must be for the defendant on the demurrer.

Judgment for defendant on demurrer.

PORT WHITBY AND PORT PERRY R. W. CO. V. DUMBLE.

Independent covenants—Substitution of contract—Reservation of rights against covenantor—Pleading.

To an action for breach of contract between plaintiffs and defendant, that defendant would build plaintiffs' railway, to be completed by a day named, defendant pleaded that plaintiffs covenanted and agreed to pay defendant a certain sum of money (in manner specified), and that, although they paid portion of the same, they made default as to the residue, which was due long before action, whereby defendant was prevented from completing the railway under his agreement:

Held, on demurrer, bad.

Equitable plea, that plaintiffs, with consent of defendant, agreed with E. to finish said railway, and defendant, before breach, abandoned said contract, and E. entered upon and took possession of the works on said railway, and continued the same with plaintiffs' consent:

Replication, that by the agreement in the last plea mentioned, plaintiffs' rights against defendant were expressly reserved:

Held, on demurrer, replication good, but plea bad, as not shewing that the alleged substituted contract contained all the essentials requisite to make it a complete discharge and release of the original one.

DECLARATION. 1st count, on an agreement between plaintiffs and defendant to build a railway from Whitby Harbour to Port Perry, in conformity with by-laws, to be fully completed and delivered to plaintiffs on or before 15th February, 1871, alleging defendants made default. The 2nd count was the same as the first, with the additional allegation that plaintiffs were to find the right of

way, and that in case of any delay in so doing, defendant should have a reasonable time for completing the work beyond the time specified; that such reasonable time had elapsed, yet defendant made default.

Plea, that plaintiffs agreed and covenanted to pay the defendant \$290,000, in manner specified, and made default before commencement of suit, whereby defendant was prevented from completing said railway under said agreement.

Equitable plea, that plaintiffs, with consent of defendant, agreed with one English to finish said railway, and before breach defendant abandoned said contract, and said English entered upon and took possession of the works on said railway, and continued the same by and with consent of plaintiffs.

Replication to equitable plea, that by last agreement plaintiffs' rights against defendant were expressly reserved,

Demurrer to plea, that the covenant of plaintiffs in the said plea set forth was an independent covenant, and not a dependent covenant as in and by said plea supposed; 2ndly, the non-performance of any of plaintiffs' covenants afforded no sufficient reason or excuse for the non-performance of the defendant's covenants; 3rdly, that said plea admitted the plaintiffs' cause of action without sufficiently avoiding same; 4thly, that said plea afforded no answer whatever to the first and second counts of plaintiffs' declaration.

Demurrer to equitable plea, 1st, that it was not shewn by said plea that the agreement therein set forth was in any manner accepted by plaintiffs in satisfaction or discharge of defendant's contract; 2ndly, not shewn by said plea that the plaintiffs released, or in any way prevented defendant from performing his contract; 3rdly, that the agreement set up in said plea, not being shewn to have been under the corporate seal of plaintiffs, was not such an agreement in law as was binding on plaintiffs; 4thly, no right to injunction in equity shewn by said plea.

Demurrer to replication, that it was no answer to said

plea that, notwithstanding the stipulation in said replication alleged, defendant was discharged and released by the matters in said plea alleged.

Harrison, Q.C., and T. Moss, for plaintiffs, cited *McIntosh v. Midland R. W. Co.*, 14 M. & W. 548; *Boone v. Eyre*, 1 H. Bl. 254; *Mattock v. Kinglake*, 10 A. & E. 50; *Stephens v. Weston*, 3 B. & C. 535; *Sibthorp v. Brunel*, 3 Ex. 826; *London Gas Co. v. Chelsea Vestry*, 8 C. B. N. S. 215; *Christie v. Bovell*, 7 C. B. N. S. 561; *Pust v. Downie*, 5 B. & S. at p. 33; *Stovin v. Deen*, 26 U. C. R. 600; *Tatlock v. Harris*, 3 T. R. 174; *Wharton v. Walker*, 4 B. & C. 163; *Dobson v. Espie*, 2 H. & N. 79; *Henneky v. Earle*, 8 E. & B. 410.

J. H. Cameron, Q.C., and Hector Cameron, contra, cited *Owen et al. v. Homan*, 4 H. L. Ca. 997; *Raymond v. Minton*, L. R. 1 Ex. 244; *Glazebrook v. Woodrow*, 8 T. R. 366; *Ellen v. Topp*, 6 Ex. 424; *Graves v. Legge*, 9 Ex. 709; *Grey v. Friar*, 4 H. L. Ca. 565; *Neale v. Ratcliffe*, 15 Q. B. 916; *Addison*, Cont., last ed.. 925; *Platt, Cov.*, 95.

GWYNNE, J., delivered the judgment of the Court.

The first count of the declaration is framed upon an agreement alleged to have been entered into by the defendant with the plaintiffs, whereby the defendant undertook to build the plaintiffs' railway, and to deliver it to the plaintiffs wholly completed, in complete running and working order, with all buildings and fixtures mentioned in the specifications, on or before the 15th day of February, 1871, and assigning as a breach that the defendant hath wholly failed in his contract, has not performed the work, and has wholly abandoned it.

The second count is upon the same contract, with an allegation that the plaintiffs were to find the right of way, and it was provided that for any delay occasioned in providing the right of way the defendant should have a reasonable period for completing the work beyond the 15th February, 1871, and that such reasonable period has elapsed, but still defendant has made default.

To these counts the defendant pleads that, by the agreement in the declaration mentioned, the plaintiffs, under their corporate seal, in consideration of the agreement therein contained on the part of the defendant, and of the works thereby covenanted, contracted, and agreed to be completed by the defendant, promised to pay the defendant the sum of \$290,000 in manner following: \$100,000 in cash and municipal debentures, \$27,000 in paid-up stock of the company, and \$163,000 in first mortgage bonds on the railway works, to be paid at the times and in the manner in the said agreement specified, provided that ten per cent., payable in bonds, might be retained until the completion of the work and the acceptance thereof by the plaintiffs, which ten per cent., together with the last instalment of the other payments, should be paid to the defendant upon the certificate of the president or managing director of the company, that the work had been completed satisfactorily and in accordance with the contract; and it proceeds to aver that, although the plaintiffs made some of the payments in accordance with their contract, yet they failed and made default in the residue of the said payments, and did not pay the same to the defendant in accordance with the terms of the contract, although the days and times appointed for payment thereof had arrived long before the commencement of this suit, and before any breach by the defendant of their contract, whereby the defendant has been prevented from completing, and has been unable to fulfil, his contract, either before the time specified for fulfilment, or at any time since.

The contention raised by this plea is, that payment by the plaintiffs is, upon the matters set out in the plea, a condition precedent to the defendant proceeding with the work; that the defendant's liability under the contract depended upon the precedent payment by the plaintiffs of the amounts agreed to be paid by them.

The authorities to which we have been referred in support of the defendant's contention do not seem to throw

much light upon the subject; and I must confess that, upon a careful perusal of the plea, I cannot think that any reasonable doubt can be entertained that it offers no sufficient bar to the plaintiffs' action.

The general rule is, that covenants are to be construed to be dependent or independent according to the intent and meaning of the parties, to be collected from the whole instrument. Here we have not the whole instrument before us, but only such parts as the defendant in his plea has thought fit to present to us; and what we find averred there is, that the plaintiffs entered into *their* covenant to pay in consideration of the defendant having entered into his covenant to do the work. There is no suggestion alleged that the defendant's covenant was entered into, in fact, in consideration of or dependent upon *the performance* of plaintiffs' covenant. Then the defendant alleges that the plaintiffs' covenant was to pay upon certain days and times *in the agreement* specified, but what those days and times were we are not informed, except that it is averred they had elapsed before breach committed by the defendant; but that, we see, could not be, for the plea alleges that the last instalment, together with the ten per cent. reserved, was not to be paid until the final completion of the work, nor then, except upon the certificate of the president or managing director of the company that the work had been completed in accordance with the terms of the contract, and accepted by the plaintiffs. Then, again, the plea avers and admits that the plaintiffs made certain of the payments provided by their contract in accordance with its terms, and in *Pordage v. Cole* (1 Wms. Saund. 320, *d*) and *Ellen v. Topp* (6 Ex. 441), it is laid down that where a person receives part of the consideration upon which he has entered into an agreement, the law obliges him to perform the agreement upon his part, leaving him to his remedy to recover any damage he may have sustained in not having received the whole consideration. It appearing then, upon the record, upon the defendant's own shewing, that what he insists is a condition precedent has been

executed in part, it is no longer competent for him to insist upon the non-performance of that which was originally, if it was, a condition precedent. The utmost that we can gather from the pleadings is, that the defendant covenanted to do certain work by a fixed day stated in the agreement, and that the plaintiffs agreed to pay the defendant, on certain days and times, as the work progressed, certain instalments of the whole amount agreed upon, reserving ten per cent. until after the final completion of the contract. Such covenants, we do not think, have ever been supposed to be dependent or mutual. The defendant became entitled to sue for and demand the instalments as the days appointed for payment arrived, unless the payment was qualified by the condition that the amount of the instalment should be ascertained and determined by reference to the amount of work from time to time done by him, and so the doing the work may have been made a condition precedent to payment, and not payment a condition precedent to the doing the work. How this may have been, not having the contract before us, we cannot say: it is sufficient for the determination of this demurrer to say that the defendant has not alleged sufficient to enable us to hold that payment by the plaintiff was a condition precedent to the performance by the defendant of his covenant, and that, if it had originally been a condition precedent, defendant's plea admits matter which precludes him now from setting up such condition precedent as a bar. Judgment, therefore, must be for the plaintiff upon the demurrer to this plea.

The defendant also pleaded, by way of defence upon equitable grounds to the second count, that during the extension of time in that count mentioned, and before any breach by the defendant of his contract, the plaintiffs, with the consent of the defendant, agreed in writing with one Caleb E. English, that he should complete the contract made between defendant and plaintiffs, with such variations as the plaintiffs and English should agree upon, and that the plaintiffs and English agreed that the railway

should be completed by the 1st day of September, 1871, and therefore the defendant, before breach committed by him, abandoned the work, and English entered thereupon and took possession of the work, and continued the same by and with the consent of the plaintiffs. To this plea the plaintiffs reply that, by the agreement in this plea mentioned, it was expressly stipulated that all the rights and remedies of the plaintiffs against the defendant for any claim of the plaintiffs against the defendant for damage sustained by non-performance of his contract by the defendant should be reserved, and that nothing therein contained should be taken in any way to prejudice the rights of the plaintiffs as to any claim against the defendant for damage on account of the non-completion of defendant's contract. The plaintiffs also demur to the plea, upon the ground that it does not shew that the substituted agreement therein alleged was executed under the corporate seal, or that it was accepted by the plaintiffs in discharge of defendant's contract, or that plaintiffs prevented defendant fulfilling his contract, or released him from it, and it does not shew matter which would entitle the defendant to an unconditional injunction in equity. The defendant also demurs to the replication for the reason that, as he contended, the matters in the plea alleged constituted a release and discharge of the defendant, notwithstanding the matters in the replication alleged.

The contention of the defendant, as it is to be collected from his demurrer to the replication and the points set down for argument, seems to be that it is not the intention of the parties to the contract which is to govern its construction, but that some expressions and terms in it shall and may in equity (the plea being pleaded by way of equitable defence), be construed to have an effect directly at variance with what was the intention of the parties at the time the contract was entered into, as expressed in the contract itself.

What may have been in reality the object and design of the plaintiffs, with the defendant's consent, agreeing

with English to let him complete the defendant's contract, and agreeing that it should be completed by the 1st September, 1871, as alleged in the plea, we cannot say, as we have not the contract, nor any evidence of the circumstances surrounding its execution, before us; but the demurrer admits, as alleged in the replication, that it was an express stipulation of that agreement that the defendant should not be released and discharged as he now, notwithstanding, insists that he has been.

It is not alleged, in either count of the declaration, that the defendant's original contract was entered into under seal, nor does it appear, by the equitable plea, whether it was or not, although by the other plea it does sufficiently appear that it was. We cannot, however, refer to the contents of that plea, on the demurrer to the equitable plea, or to the replication thereto. We might perhaps assume, however, that the contract was under seal, as the same contract was executed by the plaintiffs, and could have been only by deed, to be binding upon them. It lies upon the defendant, however, to shew, beyond all doubt, that he is discharged, as he contends he is, from his original contract. If, then, the first contract was under seal, the defendant could not be discharged from it otherwise than by a like instrument executed under seal. One deed may be substituted for another, but a simple contract can not be substituted for a deed; and that one deed was substituted for another must be shewn by the express terms of the substituted deed, or from a comparison of the two deeds themselves. If there be nothing inconsistent in the two contracts standing together, the latter will not be a release of the former: *Mayor of Berwick v. Oswald* (1 El. & B. 295). Now here it is not averred that the alleged substituted contract was by deed, and, if not, it could not discharge the original one if it was by deed: so likewise, if the original contract was not by deed, it being the intention of the parties which must govern in all contracts, a substituted agreement cannot operate as a discharge and release of the former, unless it be the intention of the

parties that it shall. Now here it is admitted that it was the declared intention of the parties that it should not so operate; and if there be nothing inconsistent in the liability of the defendant under the original contract subsisting, notwithstanding the execution of the second contract, that liability must still continue. Now it lies upon the defendant to shew the inconsistency. We have not before us the two instruments to compare them: we must take them to be as pleaded, that is, that the second contract shews an express stipulation that the liability of the defendant under the original contract shall not be discharged. A good plea should shew on the face of it that the substituted agreement did operate as a discharge of the original one; but when it is admitted on the record that it was expressly stipulated that it should not, I do not see how it can be said to accord with any principle of equity to hold that it *shall*, in violation of the expressed intention of the parties, unless it clearly appear that the two contracts cannot consistently subsist together. We cannot say, from all that appears on the pleadings, that English may not have been introduced into the transaction by and as the agent of the defendant, or that it was not perfectly reasonable that the liability of the defendant should be retained; but in that case it might perhaps be urged that the time given, to 1st September, must be considered as time given under the contract to the defendant, and so that the action was premature; but, on reflection, it may be, even if this is the light in which the transaction should be viewed, that the action is not premature, for it may be that it is the default of the agent, English, in utterly abandoning the work, that is the foundation of the action. However, not having the whole contract before us, nor any evidence of the surrounding circumstances, it is useless to speculate upon what may be the relations of the parties when the whole transaction shall appear. If upon the trial it shall appear that the action is prematurely brought, the defendant will have the benefit of that point, which is not raised upon this

record; for the present purpose it is sufficient to say that the defendant has not shewn sufficient matter to entitle him in equity to obtain an injunction to restrain an action brought upon his original contract, upon the ground of another contract having been substituted therefor, which substituted contract expressly provides, as is admitted, that the defendant's liability under the original contract shall remain: the plea does not sufficiently shew that there is a manifest inconsistency in the two contracts standing together. The replication is, we think, an answer to the plea, and the plea is itself bad as not shewing that the alleged substituted contract contains all the essential requisites to make it a complete discharge and release of the original one. When the contract shall be produced, it may appear so to operate; but we cannot so hold upon the matters as they are here pleaded.

Judgment for plaintiffs on demurrer.

NICHOLLS V. NORDHEIMER.

*Sale of goods—Verbal agreement not to be performed within a year—
Statute of Frauds.*

Plaintiff entered into a verbal agreement with defendant for the purchase of a piano at a certain price, and upon certain terms of payment, defendant agreeing to guarantee that the instrument was then free from defect and should so continue for five years, and that in case of its becoming defective within that period, defendant would, upon plaintiff's returning it within that time, refund the purchase money:

Held, reversing the judgment of the County Court, a contract not to be performed within a year, and therefore void under the Statute of Frauds, as not reduced to writing.

APPEAL from the County Court of Lennox and Addington.

The contract between the parties, upon which the action was brought, was set out thus—It was agreed between plaintiff and defendant as follows: Defendant sold and delivered to plaintiff a piano-forte at and for the price of \$325, subject to and upon the terms and conditions that, if the piano-forte should, within five years thereafter, be or

become defective, the plaintiff should have the right to return the said piano to the defendant, and the defendant should repay to plaintiff the said sum of \$325; and the plaintiff accepted the said piano, and paid to defendant the said price or sum of \$325, subject to and upon the terms, &c.; and afterwards, and before the expiration of the said five years, the said piano became and was defective, and plaintiff returned same to defendant, and all conditions were fulfilled, &c : *breach*, non-payment.

Pleas, traversing contract, and other pleas.

At the trial, plaintiff swore that he bought the piano on the contract set out in the declaration; that he paid part of the price, and gave his note for the residue; and that the agreement, as to the return of the instrument and repayment of the price, was verbal.

At the close of the plaintiff's case a nonsuit was moved for and directed, on the ground that the agreement, not being in writing, and not to be performed within one year from the making thereof, was void under the Statute of Frauds. This nonsuit was, however, subsequently set aside, when the defendant appealed.

H. Cameron, for the appeal, cited *Cherry v. Heming*, 4 Ex. 631; *Lindley v. Lacey*, 17 C. B. N. S. 578; *Harris v. Rickett*, 4 H. & N. 1; *Malpas v. London and South-western R. W. Co.*, L. R. 1 C. P. 336; *Pym v. Campbell*, 6 E. & B. 370; *Birch v. Earl of Liverpool*, 9 B. & C. 392; *Sweet v. Lee*, 4 Scott, N. R. 77; *Girard v. Richmond*, 2 C. B. 835.

K. McKenzie, Q.C., contra, cited *Goss v. Lord Nugent*, 5 B. & Ad. 58; *Wells v. Horton*, 4 Bing. 40; *Donellan v. Read*, 3 B. & Ad. 899; *Souch v. Strawbridge*, 2 C. B. 808; *Smith v. Neale*, 2 C. B. N. S. 67.

HAGARTY, C. J.—The question we have to decide is, whether this contract is void, as one not to be performed within a year, under the Statute of Frauds.

The statute provides that no action shall be brought to

charge any person upon any agreement that is not to be performed within the space of one year from the making thereof. These words, if before us for the first time for construction, would, I think, require but little argument to induce us to hold that they comprehended the present case; but the decided cases have involved the construction in so many modifications and exceptions, that it is not very easy to see our way to a clear conclusion on the basis of authority.

The leading case is *Peter v. Compton* (1 Sm. L. C. 296, ed. 1867). The defendant verbally promised, for one guinea paid by plaintiff, to give him so many guineas on the day of his marriage: the marriage did not take place within a year. The Judges, on consultation (Holt, C. J., *diss.*) decided that when the agreement is to be performed upon a contingent, and it does not appear within the agreement that it is to be performed after a year, there a note in writing is not necessary, for the contingent might happen within the year; but where it appears by the whole terms of the agreement that it is to be performed after the year, there a note is necessary, otherwise not. As the learned editor says, "the opinion of the majority of Judges in this case has been often since confirmed;" and he cites many cases. I have examined a great many. The principle seems this, that where no time is mentioned for payment of money or the doing an act, but that payment is to be made, or the thing done, on some specified event or contingency, such as marriage, the arrival of a ship, &c., &c., although the event do not actually occur till after the year, the statute does not apply, as it all might have happened within the year.

In *Wells v Horton* (4 Bing. 40), it was held that a promise by a person, for good consideration, that his executor should pay, was not within the statute, though the promiser died years after the promise. Best, C. J., quoting the statute, says: "The plain meaning of the words is confined to contracts which by agreement are not to be carried into execution within a year, and does not extend

to such as may, by circumstances, be postponed beyond that period ; otherwise there is no contract which might not fall within the statute." Park, J., quoting the decision in *Peter v. Compton* : " Here is the express distinction, that the postponement beyond the year ought to appear on the face of the contract, in order to bring it within the statute." *Fenton v. Embler* (3 Burr. 1281) is quoted, and is to the like effect.

Souch v. Strawbridge (2 C. B. 808) decided that a contract to maintain a child, at defendant's request, at so much per week or month, as long as defendant should think proper, was not within the statute. Plaintiff maintained the child over a year. Cresswell, J., asks, " For how long a period beyond a year did the plaintiff contract to keep this child, and the defendant to pay for its maintenance ?" It was answered, " For no specific period." Cresswell, J. : " How, then, can it be said to be a contract that is not to be performed within one year ?" Tindal, C. J., held it was not within the statute. It was like the ordinary case of goods sold and delivered, with implied promise to pay for them. * * * The statute has no application to an action in the present form, founded upon an executed consideration. He refers to the well known *Boydell v. Drummond* (11 East, 142). In this case Lord Ellenborough lays down what is a performance. It must be complete, not inchoate. " The rule to be extracted from this is that, when the agreement distinctly shews upon the face of it that the parties contemplated its performance to extend over a greater space of time than one year, the case is within the statute, but that where the contract is such that the whole may be performed within a year, and there is no express stipulation to the contrary, the statute does not apply. * * * Here there was no certain time stipulated for the duration of the contract."

In *Ridley v. Ridley* (34 Beav. 484) the present Master of the Rolls says : " These words have long since been held not to extend to cases which may by possibility or accident be extended beyond the space of a year, but that the

clause is confined to cases where the agreement is not to be performed, and cannot be carried into execution within that space of time."

Birch v. Lord Liverpool (9 B. & C. 392) was a verbal contract for the hiring of a carriage for five years, at so much per year, determinable, by the proved custom of the trade, on payment of a year's hiring. This was held to be within the statute.

We are of opinion that on the face of this contract it is one, the performance of which is by the act of the parties extended beyond a year.

We have now to consider the view taken by the learned Judge below in his very carefully considered judgment, viz., "The decided cases clearly establish that the words in the 4th section of the statute, 'not to be performed,' mean not to be performed on either side, and a verbal agreement is good for more than a year, provided that all that is to be done on one side is to be done within the year."

In the case before us the goods were bought and the purchase money paid, or secured to be paid by notes given, at the same time; so the mere dealing of sale and purchase was completed. The action is brought on a verbal bargain, which is to be in force for five years, that if the goods became defective, the plaintiff should have the right to return them, and defendant should be bound to pay back the purchase money. Now, was this contract one under which all that was done, or to be done, was done within the year? The learned Judge considered that plaintiff's paying the money and giving the notes was a completion of the contract on his part; but, before he could call on defendant to perform his part of the bargain, the plaintiff had, on finding the goods defective, to return them to defendant, who then, and not till then, was to pay the money. There was certainly something to be done, and a very important something, on plaintiff's part, before he could demand his money. Any time within five years plaintiff might return the goods, if defective: it would

only be on his doing this that defendant's liability would arise. This seems certainly a case in which each party had to do something.

Donellan v. Read (3 B. & Ad. 899) was a case where the landlord of premises, leased to a tenant for some years unexpired, agreed verbally to lay out £50 in improvements, and the tenant agreed to pay £5 extra rent each year for the rest of the term, commencing from the quarter preceding completion of work. The improvements were made within three or four months, and the tenant paid the increased rent the first quarter, but then refused to pay more, and the action was brought for the increased rent. Littledale, J., giving the judgment of the Court, says: "We think the contract was entirely executed on one side within a year, and as it was the intention of the parties, founded on a reasonable expectation that it should be so, the Statute of Frauds does not extend to such a case. * * * In *Boydell v. Drummond* the contract was not completely executed on one side, and the case was such that, in the common course of the publication, it was not expected that it should be completed in a year."

Cherry v. Heming (4 Ex. 631) approves of this case. Parke, B., says, "The question turns upon the construction of the words 'not to be performed;' and in *Donellan v. Read*, the Court considered that these words meant not to be performed on either side, and did not include cases where the contract was performed on the one side. That was certainly in accordance with the opinion expressed by Lord Tenterden in *Bracegirdle v. Heald* (1 B. & Ald. 722)."

Cherry v. Heming et al. was an action of covenant in a deed, whereby plaintiff assigned a patent to defendants, and they were to pay a specified sum by instalments extending over several years, subject to a proviso that if within twelve months defendants should not approve of the working of the patent, and give notice thereof, and of their intention to sell it, the payment of the first instalment should be suspended, and if, having given such notice, they should within six months sell the patent, then the

covenant should cease : averment, that defendant had not sold, &c. Plea, *non est factum*. Defendant Heming had not signed the deed, but his partner had, and a seal was there for him, and he had afterwards joined in a notice under the deed. It was objected that, as Heming had not signed, it was not within the statute, and it is rather incidentally the point as to performance within the year is noticed. They considered that the whole consideration for defendant's promise to pay was executed. Parke, B., said he considered *Donellan v. Read* an answer. It will be observed that the claim was for the money to be paid for the assignment of the patent, which was completely assigned. There were, it is true, provisions that in a certain event of something being done by defendants after the year, the covenant should cease, but this thing was not done by defendants, and so the suit was for the original consideration, for the assignment of the patent.

Both in *Bracegirdle v. Heald* and *Donellan v. Read*, the case is put of goods sold and delivered on a promise to pay, on a credit extending beyond the year. There the vendee could not resist payment on the statute, the vendor having done everything he had to do.

In *Smith v. Neale* (2 C. B. N. S. 67), Willes, J., says : " This objection as to the statute may be disposed of by reference to the agreement, " by which all that was to be done by the plaintiff, constituting the entire consideration for the defendants' promise, was capable of being performed within a year, and that it does not appear from its terms, which were undoubtedly agreed to in part, that any part of what the plaintiff was to do, constituting such consideration, was intended to be postponed until after a year from the time of making the agreement ; so that *Donellan v. Read* and *Cherry v. Hemming* are authorities in favour of the plaintiff."

The facts of this case were peculiar. Plaintiff had a patent for making toys for fourteen years, from March, 1853, stamp duties payable in three and seven years from grant or it became void. Defendant agreed by letter, 21st

June, 1855 (the stamp duty payable in three years not being yet due) that patent should be assigned to him; that plaintiff should receive five per cent. on selling price of things sold (made from the patent); and that he, defendant, should provide for the next payment on the patent; that if payments to plaintiff did not amount to so much in first year, and so much in any subsequent year, plaintiff should have the right, on notice, to reclaim the patent, repaying any payments made to keep it up; and plaintiff orally accepted this proposal. The patent was never formally assigned, but defendants had the possession and use of it until long after the term for making the next payment (£50) for keeping it up ought to have been made, but payment was not made, and patent became void. All these matters were set out in the declaration, and breaches assigned that by defendants' default the patent never was assigned, nor did defendant provide for the next payment, whereby patent ceased, and the plaintiff lost profits, &c. Many pleas were pleaded. The objection as to the statute was taken. Plaintiff had a verdict, £75, on all the issues. The objection was, that part only of the money was payable within the year, *i.e.*, the three year payment at the end of the first three years, and the residue not till the expiration of three years, besides something to be done during the whole period the patent should enure (see page 81). In this case the "entire consideration," as Mr. Justice Willes says, for defendants' promise was the obtaining the assignment, or at least the use, of plaintiff's patent, and no part of what plaintiff had to do constituting such consideration was intended to be postponed till after a year. Cresswell, J., remarked, in answer to an observation as to *Donellan v. Read*, that plaintiff had actually performed his part within a year, "The contract must, with reference to this point, be good or bad at the time it is made."

Dobson v. Colles (1 H. & N. 81) was a verbal contract of hiring until a day named, and for a year thereafter, determinable by a three months' notice on either side. It was held to be within the statute. Pollock, C. B.: "I think

that a contract is not the less a contract not to be performed within the year, because it may be put an end to within that period." Alderson, B. : "The very circumstance that the contract exceeds the year brings it within the statute.

* * * The reason for the enactment was that there might be no dispute beyond the year as to the terms of the contract."

It might be urged that where a plaintiff has altered his position by paying money for an article which the vendor warrants for a longer period than a year, or agrees to take back, if tendered within such period, ought not to be within the statute.

Giraud v. Richmond (2 C. B. 835) was a case in which defendant, in consideration of plaintiff paying him £300 premium, agreed to take him into his establishment and to pay him salary at following rates : first year, £70 ; second, £90 ; third, £110 ; and so much for subsequent years, so long as he remained, and in case of death of either party to refund £150. The Court held this to be a contract not to be performed within a year, and must be in writing.

It may be noticed that under this 4th section the contract is not made void, only the right to bring an action is taken away.

I have noticed the cases at this length in consequence of the existence of observations both in some of them and in the text-books not uniformly consistent with each other. I have arrived at the conclusion that the present action is defective by the Statute of Frauds.

In whatever aspect it is viewed I cannot regard it as other than a bargain of this kind : "If you, within five years, return the goods now sold to you, I will buy them back, and repay you the price." The plaintiff, on the happening of an event (viz., the goods being defective), at any time within five years, has to do an act (viz., to return the goods), and defendant is then to pay back the original price.

It is remarkable that I have been able to find no case in which the facts resemble those before us.

ERRATUM.

In the head-note to Wallbridge v. Everitt, *ante* p. 28, in the second line, before "covenant," read *full* ; and in the third line, in lieu of "the ordinary statutory deed," read *a deed* ; at p. 29, after "assigns," in the second line, read *or any other person or persons whomsoever* ; and in the fourth line, after "executions, &c" read *whatsoever*.

The point of law is one of much importance: its bearing on the case in the present case is not of much moment. On the plaintiff's own evidence, and the documents, I think any Judge, sitting as a jury, would promptly find against him without reference to the Statute of Frauds, or without interposing any technical difficulty as to admitting evidence of a verbal term, beside an extra or written contract, as in *Lindley v. Lacy* (17 C. B. N. S. 578) and *Malpas v. London and South Western R. W. Co.* (L. R. 1 C. P. 336). The alleged verbal bargain was hardly consistent with the provisions of the written contract. Plaintiff chose to say that he merely kept that memorandum to tell him the dates of payment, but it was produced from his custody with memorandum endorsed, apparently in his own handwriting, "A. & S. Nordheimer's *guarantee* on piano-forte No. 7999." He had, besides, to overcome the serious difficulty of his verbal bargain being made by an agent who told him distinctly that he could not alter the written agreement which was their usual one. This was rather a strong intimation to plaintiff that the principal might very naturally refuse to be bound by such a term outside the usual written guarantee.

. On the merits there was enough, possibly, to prevent a nonsuit. We can hardly, however, understand any intelligent jury, not to say a Judge, accustomed to criticize evidence, finding for the plaintiff.

I think the nonsuit was right, and the appeal must be allowed, and rule to set aside nonsuit is to be discharged.

GWYNNE, J.—The contract sued upon, as it appears to me, is in substance a contract of guarantee, whereby the defendant, in consideration of the plaintiff purchasing a piano from him, at a price agreed upon and paid at the time, partly in cash and partly by a note at six months, agreed to guarantee that the piano was at the time, and should continue to be free from any defect for the space of five years, with this term attached, that in case it should become defective at any time within five years, the defend-

ant, instead of paying damages merely for the breach of the guarantee, would, upon the plaintiff returning the piano at any time within the five years, repay the whole of the purchase money. This is a contract which, by its nature and its express terms, is to have continuing existence for the full period of five years : there is no provision contained in it for anything to be done by the plaintiff within the year. The purchase of the piano by the plaintiff is the consideration for the defendant entering into the contract, but the liability of the defendant does not attach merely upon the purchase having been effected and the price paid : his liability attaching depends upon two future contingencies, namely, the contingency, first, of the piano proving to be defective, and, secondly, that of the plaintiff returning it ; and it is expressly agreed that *if these contingencies should come into existence* at any time within five years, the defendant's liability shall attach. I cannot see how there can be any doubt that it was in contemplation of the parties that this contract should continue beyond a year. It is not merely "by possibility or accident" that the contract may extend beyond the year, but its essence, by the express stipulation of the parties is, that it shall continue for five years. In fact the contract amounts to an express agreement that, although the events that are to bring into existence the defendant's liability, and to give vitality to the contract, *shall not take place* within a year, nor until the expiration of five years, less one day, that the defendant should nevertheless repay the purchase money.

I cannot doubt that such a contract is within the statute, and must be in writing.

GALT, J., concurred.

Appeal allowed.

PALMER V. BAKER.

Insolvency—Failure to schedule debt—Pleading.

To an action on a guarantee, defendant pleaded his insolvency and issue of an attachment, and that, not having procured assent of creditors, he did, after a year from date of issue of attachment, apply to Judge for discharge, which was absolutely granted after hearing defendant and creditors.

Replication, that defendant, before making of order of discharge, did not schedule plaintiff's claim, nor did he by a supplementary or any list of creditors, previous to making of said order, set forth plaintiff's claim, which was not, in fact, ever furnished to the assignee or proved against defendant's estate:

Held, following *King v. Smith*, 19 C. P. 319, and reversing the judgment of the County Court, replication good.

APPEAL from the County Court of the County of Hastings.

The declaration was on a guarantee by defendant of a note of one McGee, payable to defendant in five years; breach, non-payment by McGee or by defendant.

Plea.—Setting up the insolvency of defendant and issue of attachment under the Act of 1864, and that defendant, not having procured assent of creditors, did, after one year from date of issue of attachment, apply to Judge for discharge after notice given of his application, as prescribed by the Act, and the Judge, after hearing defendant and objecting creditors, granted an absolute discharge.

Replication.—That defendant, before making of order for discharge, did not mention and set forth his liability to plaintiff for the claim sued on in any statement of his affairs, nor was the claim of the plaintiff shewn by any supplementary list of creditors, or any list of creditors furnished by defendant previous to the making of the order, nor was the claim of the plaintiff ever furnished to the assignee of defendant's estate, or proved against the estate of defendant.

This replication was demurred to, and judgment given thereon against plaintiff, who thereupon appealed.

Bell, of Belleville, for the appeal, cited *King v. Smith*, 19 C. P. 319; *Moody v. Bull*, 7 C. P. 71,

G. D. Dickson, contra, referred to and commented upon the Insolvent Acts of 1864 and 1865.

HAGARTY, C. J.—In the case of *King v. Smith*, in this Court, we had occasion to examine the Statutes bearing on this point. That was the case of an insolvent calling his creditors together, and thus making an assignment. It was replied that plaintiff's name was not mentioned in defendant's schedule annexed to his deed of assignment, nor in any supplementary schedule, and the debt was never proved against his estate.

There, as here, the insolvent obtained his discharge, on application, without the assent of his creditors. It was held that a debt not mentioned in any schedule was not barred.

It is unnecessary to repeat the very cogent reasons which we considered to require the construction we placed upon the Statutes. It has been attempted to distinguish the present case on the ground of this being a compulsory liquidation.

The necessity for a schedule in the case of compulsory liquidation was discussed by us, and we think the opinion of the Court on that point was clearly expressed. As was pointed out by my brother Gwynne, "The only clause of the Act which gives any effect to any discharge is the 3rd sub-sec. of 9th sec., which provides for a discharge by consent in writing of the creditors. * * The effect of this discharge is to free him from all liabilities, except such as are specially excepted, existing against him and provable against his estate, which are mentioned and set forth in the statement of his affairs annexed to the deed of assignment, or shewn by any supplementary list of creditors furnished by the insolvent previous to such discharge, &c." Again, speaking of discharge without consent, either after voluntary assignment or compulsory liquidation, "As a discharge when granted has no effect under the Act but that declared in sub-sec. 3, it is plain that the discharge obtained from the Judge under 10 sub-sec. can have no greater effect than that obtained under sub-sec. 3."

My own view is most fully set out: "When the insolvent applies for discharge a year after the attachment (not having obtained any creditors' assent), I think it can be answered by reference to the sub-sec. 3 already quoted, and that the insolvent can and ought to supply such list or schedule of creditors under the words, 'which are shewn by any supplementary list of creditors furnished by the insolvent previous to such discharge.'" It had been previously pointed out that sub-sec. 10 of sec. 9, must be read by the light of the preceding sub-secs. 3 and 5.

We do not feel at all pressed by the argument, apparently much relied on in the Court below, that the means of making out a schedule is taken from insolvent by the seizure of his books and papers. Access to them, if in the hands of an assignee, could, we presume, at all times be obtained either with the assignee's assent, or on application to the Judge, who could readily see that no such difficulty should be interposed. The Statute, after directing the seizure of everything under the attachment, allows the insolvent to come in in five days from the return and petition to suspend proceedings, and call a meeting of creditors, and by sub-sec. 16, sec. 3, he shall produce with such petition a schedule of his estate, and a list of his creditors, with amount of debts, places of business and residences, with particulars of negotiable paper, &c., &c.

No such difficulty was evidently anticipated in this proceeding, from the fact of all the papers, books, &c., being under seizure; nor would it be anticipated by sec. 11, under which the insolvent would apparently have to send notices of his intended application for discharge to all creditors, &c., in the Province.

It is also said, in the case cited, as to a discharge like the present, "there would be a list of creditors prepared by the company, guardian, or subsequent official assignee, and on the examination of the insolvent under sec. 10, or at any other time up to the application for discharge, there would certainly be in some shape or other a list or schedule furnished by or supplemented and corrected by the insolvent coming within the construction of the sub-sec. 3."

I can hardly conceive anything more objectionable in principle, or injurious to the rights of creditors, than to permit a debtor to obtain a general discharge from liabilities to creditors not named by him, nor stated as having any claim on his estate, and whose existence as such may be wholly unknown except to himself.

In the case before us, of a promise to guarantee the payment of a note of another person, the transaction might possibly have never been entered in his book, and an assignee might know nothing of it.

I attach no importance to the omission in the replication of any averment as to knowledge by the plaintiff of the insolvency proceedings.

One of the many mischiefs which may be caused by allowing a general discharge to a debtor without filing a schedule, or as to creditors not mentioned in a schedule, might be that a debtor might suppress the existence of heavy claims, and either make fraudulent or preferential arrangements with the holders of such claims, or influence the conduct of his known creditors by making them believe his debts to be much less than they really were.

I feel much strengthened in the views I expressed in *King v. Smith*, by the argument and consideration of this case.

It would be much to be regretted if a just claim can be defeated on the state of facts admitted to exist by the demurrer to the replication.

I can conceive a case where after attachment issues, the insolvent may, for a long time, either be absent or take no part in the distribution of his estate. A schedule of creditors must of course be prepared by the assignee for dividend and other purposes. If the insolvent petitions for his discharge, it may be that he may adopt it as his own, or frame his application so that it refers to that as his schedule, and as the schedule of the claims from which he seeks discharge. We think the case of *King v. Smith* governs the present.

We direct that the appeal be allowed, and judgment

given in the Court below for the plaintiff on the demurrer to the replication.

If the defendant be advised that he can bring himself within the operation of the Statute, he may perhaps, on payment of all costs incurred by these proceedings, be allowed by the Court below to amend. This however is, of course, only by way of suggestion.

GWYNNE, J.—As this is an appeal case, our decision in which is final, I have reviewed our observations in *King v. Smith*, which was not a case of compulsory liquidation, with a view to a further consideration of the question now pointedly arising, whether a different effect should be given to a discharge granted by the Judge to an insolvent in compulsory liquidation than to that given by consent of creditors; and if, upon more mature reflection, I had any reason to doubt the suggestions made in *King v. Smith*, I should not in this case have felt myself bound by that judgment; but I see no reason whatever to vary from anything there said as to justify a doubt that the effect of a discharge, however obtained, is the same in compulsory as in voluntary liquidation,

A debtor has no claim to exemption from payment of all his debts in full, except in so far as the Act expressly declares he shall be discharged: for the effect of a discharge in any case, whether in compulsory liquidation, or upon a voluntary assignment, we must look to the Act, and to the Act alone. The only effect which it declares that it shall have is, that it shall discharge the insolvent from all liabilities which are mentioned and set forth in the statement of the insolvent's affairs annexed to the deed of assignment, or, as the Act of 1869 has it, "exhibited at the first meeting of creditors," or which are shewn by any supplementary list of creditors furnished by the insolvent previous to such discharge, *and* in time to permit the creditor therein mentioned obtaining the same dividend as other creditors on his estate, or which appear by any claim subsequently furnished to the assignee." It is contended that

this sentence is inapplicable to the case of compulsory liquidation, as the insolvent in that case *is not required* to furnish a list of creditors as he is in the case of a voluntary assignment. The answer to this argument is that the section in which the words are found is expressly declared to apply equally to the case of compulsory liquidation as to that of voluntary assignment. But it is said the discharge there spoken of is one granted by *consent* of creditors. True, but there is nothing in the Act to justify the idea that a discharge given by a Judge can have any greater effect than that given by the consent of creditors, for the Judge can only be called upon to give, after the expiration of a certain period, that which within the period the insolvent might have obtained by the consent in writing of his creditors. It is only in the event of the insolvent not having gotten the consent of his creditors that the Statute gives the Judge jurisdiction to give that which the creditors might have, but have not, given. It follows then that the act of the Judge can only be co-extensive with that of the creditors, if by their consent the discharge had been obtained. There is not a syllable in the Act which gives to the discharge of the Judge any greater effect, nor is there in principle any reason why it should have any greater effect, than that given to a discharge by consent of the creditors. It is said, further, that the lists spoken of are *not required* in compulsory liquidation. Assume that they are not required; what then? The Act makes the discharge, or its effect, depend upon their being supplied; and if an insolvent desires to be discharged, it is his *interest*, if he is *not required* by the Act, to furnish the list without which he cannot get a discharge. The Act need not compel the insolvent to entitle himself to his discharge: it may leave that optional with him; but it does provide him with the means, and if he neglects the means, he must blame himself, and not the law, if he cannot obtain an effectual discharge. I cannot understand why he should expect that a law passed for the purpose of securing equal justice to all creditors, should be construed so as to

enable him to defraud certain creditors by suppressing their claims altogether. The law, as it seems to me, offers a premium to an honest debtor furnishing faithfully a list of all his creditors, so that all may alike share in his estate, by giving him a discharge from the claims of such creditors, so furnished, on his surrendering his estate, holding *in terrorem* over him, to compel him to be honest, the alternative that, in so far as he fails to do so, he shall not be discharged.

GALT, J., concurred.

Appeal allowed.

IN RE BOTSFORD.

Insolvency—Appeal—Jurisdiction over removed assignee.

J. was appointed official assignee of B. under the Insolvent Acts of 1864–1865. After the Insolvent Act of 1869 came into force, the creditors removed him and appointed another assignee in his place. Before his removal, J. rendered an account of his receipts and disbursements, with which the creditors were dissatisfied, and presented a petition to the Judge to examine the account, to settle and adjust it, and to order J. to produce the books, papers, and vouchers of the estate, and to pay over all moneys which might be found to be in his hands. The Judge held that the assignee, having already rendered an account, must be taken to have “fully accounted” within the meaning of the Act of 1864; that he had no jurisdiction over the removed assignee under that Act; and that he could not proceed under the Act of 1869, as the relief sought was not a “matter of procedure merely,” and he dismissed the petition:

Held, on appeal, 1, that the summary remedies given by the Act of 1869 are applicable to assignees appointed under the Acts of 1864–1865; 2, that the Judge had jurisdiction even under the Act of 1864 to examine into and decide upon the correctness of the items of an assignee’s account, and to adjust such account; 3, that this jurisdiction exists over a removed assignee until he has “fully accounted” for his acts and conduct while he remained assignee; 4, that an assignee has not fully accounted within the meaning of the Act by rendering an account merely, but that the expression necessarily means accounting and paying over; 5, that the “duties” of an assignee are to conform himself to the law; and the performance of these duties may under either Act be summarily enforced by the Judge, and a removed assignee remains subject to this jurisdiction until he has fully accounted for his acts and conduct while he remained assignee.

SPECIAL CASE.

APPEAL under Insolvent Act of 1869 from the Judge of the County Court of the United Counties of Leeds and Grenville.

The case stated the following facts : 1. On 12th October, 1868, the insolvent made a voluntary assignment, under the Insolvent Acts then in force, to one Jones, who was an official assignee duly appointed under said Acts, and who continued to be assignee of the said insolvent until his removal as hereinafter mentioned. 2. A demand was, on 25th June, 1870, duly made upon the assignee to call a meeting of creditors for the purpose of removing him from the said office and of appointing another in his room, in compliance with which demand a notice calling such meeting was given, and a meeting held pursuant thereto on 13th July, 1870, at which a resolution was duly passed to remove the said assignee, and to appoint one Macfarland in his stead. 3. Said Jones, at said meeting of creditors, rendered an account purporting to shew his receipts and disbursements in the matter of the said estate, and thereby claimed that he had received \$3,281.74 and had paid a dividend to creditors of \$1,453, and that, after deducting such payments and his remuneration as assignee, and the necessary expenses alleged to have been incurred in managing the estate, there would be a balance due to him of \$326.08. 4. The creditors claimed that said Jones, at the date of his removal, had moneys in his hands belonging to the estate of said insolvent, which should be paid over by him to the assignee appointed in his stead, and that he retained in his custody the books, papers, and vouchers of said estate, which he refused to deliver to said Macfarland. 5. Thereupon said Macfarland and several creditors of the said insolvent, afterwards, on the 7th November, 1870, presented their petition to the Judge of said County Court, setting forth the foregoing facts, and praying him to examine the accounts of said Jones, and to settle and adjust same, and to order him to pay over to said Macfarland the balance that might be found to be in his hands, and to deliver to said Macfarland all books of account, vouchers, letters, and other papers and documents in his custody, and all the estate and effects of said insolvent remaining unrealized. 6. The Judge of said County Court,

after hearing counsel for the petitioners and for the said Jones, dismissed the petition, on the ground that said Jones, having rendered an account, must be taken to have fully accounted under the Act of 1864, and further, that he had no jurisdiction over said Jones after his removal, and that he could not proceed under the Act of 1869, as the relief sought was not a matter of procedure merely.

The questions for the opinion of the Court were: 1. Whether the learned Judge had jurisdiction, upon the removal of the assignee, to grant the prayer of the petition, or any part thereof? 2. If he had, whether, under the circumstances appearing, he should not have exercised the same? And therefore, 3. Whether his judgment should not be varied to some, and, if any, to what extent?

F. Osler, for the appeal, cited *Archibald v. Haldan*, 30 U. C. 30; *Re Chaffey*, 30 U. C. 64.

Holmsted, contra.

The statutes cited are referred to in the judgment.

HAGARTY, C. J., delivered the judgment of the Court.

We are of opinion that the Act of 1869, in all matters connected with the conduct of assignees and the jurisdiction of the Court over them, at all events as to matters occurring after that statute, is to govern this case. Such matters are "of procedure" and of general application. The fact of Mr. Jones having been appointed under the Act of 1864, affords no reason why he should not be liable to all subsequent legislation as to the office that he holds and acts done by him thereafter. An Act regulating the office of sheriff, and providing better or more summary remedies to compel a due performance of duty, would, we have no doubt, be applicable to all existing sheriffs.

It is not necessary to enquire what effect, if any, subsequent legislation may have on any previously existing liabilities of sureties.

In re Chaffey, 30 U. C. 71, the Queen's Bench held that, in proving debts, "the specifying the value and amount of

a security held, and putting a value on it under oath, and the other proceedings to be taken with respect to it, is not a matter of procedure merely."

We fully agree with that decision, so far as we understand it, as holding that anything affecting the rights of creditors in the distribution of the assets, or creating a new or different method of proving against a joint and separate estate, which would substantially alter the course of distribution, could not be considered a mere matter of procedure. In pending insolvency cases the assets would be distributed under the previous law, and no new right would be given, as was contended for in the case cited, to prove on two estates instead of electing on which alone to prove.

We are bound, on this appeal, to decide according to our own view, as our decision is, we believe, without appeal: we do not, however, consider that anything in Chaffey's case is opposed to the opinion we entertain on this point. The section 154 repeals all previous Acts except as regards proceedings commenced and now pending thereunder, and as regards all contracts, acts, matters, and things made and done before this Act shall come into force (*viz.*, 1st of September, 1869), &c., &c.; and as to all such contracts, acts, matters, and things, the provisions of the said Acts shall remain in force, and shall be acted on as if this Act had never been passed; provided always that, as respects matters of procedure merely, the provisions of this Act shall for the future supersede those of the said Acts, even in cases commenced and now pending."

We see nothing to prevent the operation of any enactment to ensure more efficient discharge of duties by assignees on proceedings wholly arising after the 1st of September, 1869, in insolvency cases commenced before that period.

The decision at which we have arrived would most probably be the same if the Act of 1869 had never been passed. The petition to the learned Judge set out that Mr. Jones, at the meeting of creditors which removed him from his office of assignee, produced an account of his

receipts and disbursements annexed to the petition ; that they consider it erroneous and the charges excessive, referring especially to an item of \$1056 for keeping insolvent's store open from the 12th of October to the 20th of February following ; that, on a proper adjustment of the account, it will appear that he has a large sum of the estate in his hands ; that the creditors cannot adjust it with him, though they have repeatedly tried so to do ; that he has executed a conveyance to the new assignee, but refuses to deliver up the estate and effects, books, papers, and vouchers.

The prayer is, that the Judge will examine the said account, and settle and adjust the same, and order him to produce books, papers, and vouchers ; that he will order Jones forthwith to pay the new assignee the balance that may be found to be in his hands, and to deliver all the estate and effects unrealized, with the vouchers, books, securities, &c., and to pay the costs of the application.

The learned Judge, after argument, dismissed the petition.

As far as we can understand the facts, the substance of the complaint against the late assignee is, (1) his charging this sum of over \$1,000 for keeping open the insolvent's shop for several months ; and (2) his refusal to deliver up securities and vouchers, &c. The latter point seems to us but slightly dwelt upon. It appears that no rate of remuneration was settled by the creditors until and at the meeting which removed Mr. Jones ; that then it was resolved that his remuneration was to be 5 per cent. on the cash receipts of the estate, in addition to actual and necessary disbursements, such sum to be in full of all services rendered, &c.

We understand also that Mr. Jones, in his account, charges 5 per cent. on cash receipts, and, in addition, this disputed item of over \$1,000 for keeping open the store, at the rate of \$8 per day, including expenses for men taking charge, selling the goods, collecting accounts, and including taking stock. We assume that Mr. Jones does not claim this sum to be actual disbursement, but that some at least of it is for his own work and labour.

The law directs that the remuneration of the assignee shall be fixed by the creditors; but, if not so fixed before a final dividend is declared, it shall be put into the dividend sheet at a rate not exceeding 5 per cent. on the cash receipts, under the Act of 1864, subject to any creditor's objection as being too much, and, under Act of 1869, subject to contestation by any party interested, as being insufficient, or as exceeding the value of the services rendered. This last provision enables the assignee, as a party interested, to object to the 5 per cent. as insufficient. The Act of 1864 apparently left him without remedy or power of objection, and fixed 5 per cent. as a maximum if nothing settled by the creditors.

Now, in the case before us, up to the last meeting, the creditors fixed on no sum. It seems to us, then, that when nothing was fixed, Mr. Jones was not therefore entitled to fix his own remuneration. There is nothing before us involving or even suggesting any contest of fact, such as whether the shop was kept open by Mr. Jones on his own responsibility, or whether by any order or resolution of the creditors.

We must assume that, on the face of these papers, this heavy item of expense was incurred solely on Mr. Jones's own discretionary action. The law must be in a very incomplete and unsatisfactory state if the propriety or impropriety of such a charge by an assignee cannot be inquired into and settled by the Court, without leaving the parties to the cumbrous and expensive process of an action against Mr. Jones or his sureties. Is his position different now, that he has been removed, from what it would be if he were still assignee?

Both statutes declare that the assignee shall be subject to the summary jurisdiction of the Court or Judge in the same manner and to the same extent as the ordinary officers of the Court are subject to its jurisdiction, and the performance of his duties may be enforced on summary petition under penalty of imprisonment, &c. The Act of 1869 adds to this other provisions.

Now, without discussing what power the Judge may have over the "ordinary officers of the Court," we have the clear enactment that the performance of the assignee's duties may be enforced by the Judge. Then, we have the enactment that a removed assignee "shall nevertheless remain subject to the summary jurisdiction of the Court and of any Judge thereof, until he shall have fully accounted for his acts and conduct while he continued to be assignee."

We think we must hold this to give the same full and summary power over the removed, as over the existing, assignee as to all his "duties." Any lesser construction would, we think, defeat a most wholesome provision of the Acts. In this view, then, to what extent could the Judge below have acted on this petition? He finds Mr. Jones presenting an account such as has been stated. If he be not entitled to charge anything for himself beyond the 5 per cent., he has apparently in his hands certain moneys of the estate which ought to be paid over.

The learned Judge seems to consider that the words in the statute, "until he shall have fully accounted for his acts and conduct," may not extend beyond rendering an account, which has been done.

We are of opinion that if a man be bound by law fully to account for his acts and conduct in a particular office, he cannot possibly be held to have done so if his accounts shew that he retains money in his hands which he ought to pay over. We cannot conceive that the Legislature meant by these words anything so practically useless. If a man be bound "fully to account for all moneys received," we consider this means necessarily accounting and paying over.

The old action of Account, or Accompt, is now not resorted to, the action for money had and received having superseded it. It was not brought merely to obtain a statement of moneys received: it lay for a specific sum received. The judgment was first "*quod computet*." He had then to account before auditors. Then another judg-

ment was given that plaintiff should recover of defendant so much as was found in arrear. The bail given before the auditors was, that he appear, &c., and, if found in arrear, that he pay or render himself. See *Com. Dig.*, "Accompt," and "Bail," G. 2.

Both Acts provide that the assignee shall be subject to all rules, orders, and directions, not contrary to law or to the provisions of the Act, which are made for his guidance by the creditors; and express directions are given as to his dealing with moneys received.

We think the assignee is bound, as one of his duties, not to retain any money in his hands, as his remuneration, to which by law he is not entitled, and that the creditors can, by application to the Court or Judge, compel him to account therefor to the estate, and either pay the same into bank, as directed by the statute, in the name of the estate, or apply it, with any other money, towards payment of a dividend.

A removed assignee can also, we think, be compelled by the same authority to pay over all moneys shewn to be in his hands belonging to the estate, and until he has done so, he has not, in the words of the statute, "fully accounted for his acts and conduct."

The learned Judge suggests that he can find nothing in the statutes imposing upon him the duty of examining and auditing the accounts of a retiring assignee. The Act of 1869, sec. 34, allows the appointment by the creditors of "inspectors," with general powers to sanction any act or adopt any course for which the creditors' assent is required; and sec. 54 provides for the final passing and allowance of the assignee's accounts shewing the expense of winding-up the estate. The Judge may cause the accounts to be audited by the inspectors, or by some creditor or creditors named by him for the purpose. The Act of 1864, sub-secs. 22 and 23, of sec. 4, provides for this final account. The assignee is to prepare it, and keep it open for inspection at his office, and petition for his final discharge. The Judge, "upon hearing the parties," may

refuse to grant the petition. There is no provision there for reference of the account to inspectors or selected creditors.

By the Imperial Bankruptcy Act of 1869, and the general rules made thereunder, it was provided (Rule 108) when no remuneration had been voted to a trustee he should be allowed out of the bankrupt's estate such proper costs and expenses as might be incurred by him in and about the proceedings of the bankruptcy as the taxing master or registrar shall allow; and by Rule 121, where a trustee dies, resigns, or is removed prior to obtaining his release, the creditors shall determine what, if any, remuneration shall be paid for the services which he may have rendered.

We are of opinion that the Judge, under that Act, would have no alternative but to hear and decide upon any item or charge in the account objected to or contested by a creditor. Neither Act expressly provides for the auditing of the accounts of a removed assignee; but if it be granted, as we think it must, that such an officer can be compelled by the Court or Judge, to account for and pay over moneys of the estate, the conclusion seems inevitable that the Court or Judge must necessarily examine and decide on all disputed items for the purpose of deciding the matter in controversy, which is, whether the removed assignee has or has not any such moneys in his hands.

The Act of 1864, sec. 11, sub-sec. 16, speaks of various costs, including "the costs of winding-up the estate," after being submitted to a meeting of creditors, being afterwards taxed by the Judge. The Act of 1869, sec. 135, under the head of "Procedure generally," provides that the remuneration of the assignee, &c., &c., and the costs of the discharge of the assignee, being first taxed by the Judge at the tariff, or, if there be no tariff, at the same rate as is usual for uncontested proceedings of a similar character, after notice to the inspectors, or to at least three creditors, shall also be paid, &c., &c.

In the case of an existing assignee, we see no reason to doubt that the Judge has the right, in the way pointed out, to tax and audit all claims for remuneration.

We are, also, of opinion that the retiring or removed assignee can be dealt with in a similar manner. The "duties" of every assignee are to conform himself to the law. The performance of these duties may be summarily enforced by the Judge, and a removed assignee remains subject to this summary jurisdiction till he has fully accounted for his acts and conduct. The Act of 1864, sec. 4, sub-sec. 20, provided that the sum put in dividend sheet for the assignee should be subject to objection in the same manner as any other item of the dividend sheet. The large powers of the Court are set out in section 50 of the Act of 1869, and we may gather from it how fully the Legislature intended to vest the control, management, and disposition of the estate in the hands of the Court, without the intervention of "suits, seizures, or other proceedings of any kind."

On the whole, we are of opinion that the petition must be referred back to the Court below for its consideration. In the view we take of the law, the difficulties pressing on the mind of the learned Judge are not to prevent his right of jurisdiction over the late assignee. It may be recommended to all the parties in difference whether it would not be the wiser course voluntarily to submit the adjustment of Mr. Jones's claim on the estate to the Judge, to decide, after hearing the parties, what is just and right to be allowed. If this be not agreed to, it must, of course, be dealt with in due course of law.

Appeal allowed.

STORMS V. THE CANADA FARMERS' MUTUAL INSURANCE COMPANY.

Mutual insurance—Premium note current at time of assignment—Assignee ignorant of non-payment—Pleading.

The non-payment of a cash premium note given by the original assured in a Mutual Assurance Company, the Company having assented in writing to the assignment, cannot be set up against the assignee and alienee of the policy, the note being current at the time of assignment, and the alienee or assignee not being aware of its existence or non-payment.

THIS was an action on a policy of insurance, the declaration alleging that the policy was issued from the Mutual Branch of defendants' Company to Lemuel Storms; that he had paid, or promised to pay, to them \$7 for insuring against fire; and the defendants undertook to insure him to \$700 for three years.

The conditions were set out in full. No. 2 provided that every person wishing to become a member of the Company shall, previous to being insured, deposit his application and survey, together with his cash premium, or his promissory note therefor, dated on day of application, &c. No. 4 provided that in all cases where the policy was to be assigned, the assignee should sign or give a new note, or give a security for the payment of the first note. Till the assignment should be approved the Company were not to be bound, and they might, at their option, ratify or confirm the assignment, the sum of one dollar being paid upon the assignment being approved of. Clause 15 set out the provisions of the statute as to non-payment of a cash premium note.

The declaration then averred that Lemuel Storms, about the 23rd February, 1869, aliened the premises to the plaintiff, and within thirty days assigned the policy to him by assignment (set out) endorsed on the policy; and that within thirty days he applied to defendants to have the assignment ratified and confirmed to him for his own use, &c.; and it was then duly ratified according to the conditions of the policy, and the directors, by memorandum endorsed

(set out) on the policy, dated 1st March, 1869, in consideration of one dollar paid by plaintiff, consented to the assignment, subject to the conditions of the policy; and that afterwards a loss by fire occurred, &c.

Plea, that when Lemuel effected the assurance, he gave defendants his note for the cash premium, payable therefor, and said note remained unpaid for thirty days after maturity, and at time of loss was thirty days in arrear and still was unpaid, and that, on defendants giving consent to the assignment, plaintiff became subject to Lemuel's liability.

Replication, that at time of assignment defendants held said note, which was not then due, and without informing plaintiff thereof, or requiring him to give security for its payment, ratified and confirmed the assignment; that he was not liable, as endorser or otherwise, on said note, and had no knowledge of its existence until after the loss, and that he is in no default, nor subject to any liability which would in any way avoid the policy, or prevent the plaintiff from recovering.

To this replication defendants demurred, on the ground that, while it confessed the truth of the plea, it did not avoid the same, and that, under defendants' Act of incorporation, and the conditions of the policy, plaintiff was debarred from maintaining the action, notwithstanding the allegations in the replication.

The plaintiff also excepted to the plea as affording no answer to the action; that it did not shew that said note was due and unpaid prior to the assignment of the policy, nor said plaintiff in any way liable for payment of the note, or in default as to any payment due by him as primary debtor or surety to defendants; that it did not shew that plaintiff was at any time subject to any liabilities that would avoid the policy or prevent recovery thereon, &c.

Craigie, for the demurrer, cited 14 & 15 Vic., ch. 163; 31 Vic., ch. 92; 27 & 28 Vic., ch. 101; 29 Vic., ch. 94, secs. 2, 3; *Merritt v. Niagara District Mutual Insurance Co.*, 18 U. C. 529; *Scott v. Niagara, &c., Insurance Co.*, 25 U. C. 119.

Britton, contra, cited *Kuntz v. Niagara, &c., Insurance Co.*, 16 C. P. 136, 573; *Butler v. Waterloo Insurance Co.*, 29 U. C. 553.

HAGARTY, C. J.—The defendants were incorporated by the name of the “Canada West Farmers’ Mutual and Stock Insurance Company,” in 1851, by stat. 14 & 15 Vic., ch. 163, and were empowered “mutually to insure their respective properties, and also to insure the houses and personal property of others, for such term and at such premiums as shall be agreed on between the said corporation and the parties insuring.” They were to have separate branches, mutual and proprietary; the proprietary stock, composed of stock in shares subscribed and paid, for the purpose of fire insurances of others, and the members being divided into two classes, mutual and proprietary. Full powers are given to do business in each branch. No reference is apparently made to the general statute law of Mutual Insurance Companies, but many like provisions as to premium notes, title, &c., are set out.

Section 25: If property insured be alienated, the policy to be void, but the grantee, having it assigned to him, may have it ratified and confirmed to him for his own use, &c., on application within thirty days, on giving satisfactory security for such portions of the deposit or premium note as shall remain unpaid, and by such ratification and confirmation the party causing the same shall be entitled to the rights and subject to the liabilities of the original party under that Act.

By stat. 27 & 28 Vic., ch. 101 (1864), further powers were given to defendants. Sec. 1 enables them, for the purpose of equalizing their assessments, and providing for the speedy payment of losses and expenses of management, to raise an equalization or reserve fund, by assessing the premium notes as they deem expedient: provided the sum to be paid by each member shall be in proportion to his premium note, and shall not exceed one per cent. for the three years’ risk on the \$100 insured on isolated farm pro-

perty, until the whole fund be exhausted. Sec. 2 allows them to issue policies and collect premiums in cash for terms of one, two, or three years, as well as policies with a premium note; and in any such case, where a fixed cash premium is paid, the Company may dispense with a premium note.

By stat. 29 Vic., ch. 94 (1865), in sec. 3, it is declared in case any note given, or to be given, for a cash premium of insurance, to the Company, or any sum that may be hereafter assessed upon a premium or deposit note given or to be given to the said Company, shall remain in arrear and unpaid for thirty days after the same shall be payable, the policy of insurance held by the person in default shall thereupon become absolutely null and void, provided always such person shall remain liable to the Company for the amount so in arrear and unpaid, and provided that the directors, in their discretion, upon payment of such sum, and on such terms as they think proper, may waive the forfeiture.

By 31 Vic., ch. 93 (1868), the corporate name was changed to the present form, and by sec. 7 the Act was declared to be subject to the provisions of any general Act regulating insurance, which may be made applicable to companies of the same class, &c., to be passed in the present or any future session.

All the preceding are Acts of Canada or of the Dominion.

The Ontario Legislature, 31 Vic., ch. 32, passed some months before the last cited Dominion Act, professes to amend U. C. Consol. Stat., ch. 52, the General Mutual Insurance Act. Sec. 3 says that the cash premium paid at the time of insurance shall in no case be held to be part of the annual assessment; and sec. 5 declares that when policies are issued, and premiums in cash collected thereon, for periods of one year, as by law provided, the person so paying in cash shall not be liable to any further charge or assessment whatever, nor shall they thereby become members, unless so provided by the by-laws of the Company. This Act does not expressly refer to any specially incorporated Company.

If the Company choose to take a note from a party insuring for the premium which he would otherwise pay in cash, in the absence of any provision, statutable or by express contract, to the contrary, there would be no reason whatever for holding the non-payment thereof any defence to their liability on the policy.

We must therefore examine the true effect of the provision on which they rely.

I think this defence would be clear to a claim of Lemuel Storms. The position of the plaintiff seems, however, to be wholly different.

Sec. 25 of the Act of incorporation provides for alienation of the subject matter insured. The alienee may have the policy assigned to him, and may have it ratified and confirmed to him for his own use and benefit, with the directors' consent, on giving proper security, to their satisfaction, for such portion of the deposit or premium note as shall remain unpaid. If this be done, the party shall be entitled to all the rights and privileges, and be subject to all the liabilities, to which the original party insured was entitled and subject under the Act. This clause is similar to sec. 30, of ch. 52, U. C., Consol. Under this it is held the assignee may sue in his own name: see *Kreutz v. Niagara, &c., Insurance Co.* (16 C. P. 131).

When plaintiff obtained the required consent of the directors, he was insured to his own use and benefit, not merely holding a policy which could only be available in the name of his assignor. No doubt all the clauses regulating the subject matter of the insurance, the risk, the title, &c., remained as before.

The defendants, when they assented and thus created a novation of the insurance in favour of plaintiff, had either received from Lemuel a sum in cash, as for an ordinary insurance in a purely stock company, or had taken Lemuel's note for such sum in cash. The note was then current. Plaintiff knew nothing of its existence; defendant's did know of its existence, and then held it, but did not, as they clearly might have done, require plaintiff either to pay or secure that note, or give his own in lieu thereof.

The provisions just cited as to securing to their satisfaction any unpaid portion of the deposit or premium note, referred, I consider, to the assessment note given on the mutual principle.

Now the statute, and the clause in the policy copied therefrom, declare that if the note given for a cash premium remains unpaid for thirty days from maturity, "the policy of insurance held by *the person in default* shall thereupon become absolutely null and void." Who is the person in default, and does this apply to the policy held to his own use and benefit by any one except the person who has made default in payment of his note? The section throws light on this by declaring that "such person" shall remain liable to the Company for the amount so in arrear and unpaid, and the directors may waive the forfeiture on payment of the sum.

We must, I think, construe this provision of forfeiture with reasonable strictness; and I have arrived at the conclusion that the non-payment of Lemuel's note does not avoid the policy now held by plaintiff. Plaintiff has never, as is admitted in the pleadings, been in default to defendants, and I think the operation of his dealing with them was to place him in the position of the holder of a policy of insurance for value to his own use and benefit, and for which full consideration had been received by the underwriters.

The defendants had the fullest opportunity of fully protecting themselves when they accepted plaintiff's dollar, and executed the consent to the assignment to plaintiff. They knew the legal effect of such assignment so assented to; they never informed the plaintiff that a note had been given; and unless compelled by strict rule of law so to do, no Court should give place to such a defence. Had the Legislature merely avoided the policy generally, on non-payment of the note, I think the defence would probably avail: it seems to me they have confined it to policies held by persons in default.

Until some time after this policy ceased to be held by

Lemuel, and was held by this plaintiff, there was no default of any kind, so that when default was made, it was by a person no longer the holder, or interested in the policy. The only doubt as to this is under the 25th section, as to the assignee of the policy becoming "entitled to all the rights and privileges, and be subject to all the liabilities to which the original party insured was entitled and subjected under this Act."

It appears to me that this does not affect this case. The words follow the direction as to the directors' assenting to the assignment on receiving security to their satisfaction for such portion of the deposit or premium note that remained unpaid. This being done, and the assent given, I think the liabilities of the original party must be confined to the liabilities created by the policy, such as all the provisions as to risk, condition of premium, other insurances, &c., and do not affect such a liability as an outstanding note then current for a cash premium.

When this Act was passed the system of cash premiums or notes therefor were hardly contemplated by strictly mutual companies.

In the case of an insurance with a stock company, where cash is usually paid, if the company choose, for the accommodation of the insured, to take his note therefor, trusting to his solvency, then, in the absence of statute or express contract, I cannot understand how an assignee, with their assent, can be either liable to pay the outstanding assignor's note, or can lose his rights on a subsequent default in payment. Without the aid of the clause as to non-payment of cash premium notes, I feel very strongly that the defence would not avail. Under the section as to becoming subject to the liabilities of the original party, the only liability (if any) would be to pay the \$7 note outstanding of Lemuel Storms. There would be nothing to work a forfeiture. If at the time of the assent to the assignment to plaintiff, Lemuel's note had been thirty days in arrear, and there had been no communication of such fact to plaintiff, the language of the Court of Queen's

Bench, in *Kreutz v. Niagara, &c., Insurance Co.*, on a similar clause, would apply. Wilson, J., says: "This clause cannot mean that every cause of forfeiture which had accrued in the time of the original assured may be enforced against his alienee and assignee by the Company, when the assignee had taken without notice or knowledge of such cause of forfeiture, and although the Company had, with full knowledge thereof, accepted the assignee in the place of the original party, because it would lead to consequences which were never contemplated, and would subject the assignee to privations which he could not guard against, and would encourage the most mischievous frauds." Again: "Forfeitures are not favoured in law, and this ratification is too unequivocal an act to justify us in depriving the plaintiff of the benefit of the policy for the cause assigned."

In our case there is no existing default or forfeiture, when the assent was given, to be waived or condoned.

I think the defendants are in this position—if the assignee be liable, as they assert, to the liabilities of the assignor, then they can make him pay the \$7 note; but if they wish to avoid the policy, this can only be done under the forfeiting clause, which, as already shewn, only refers to policies held by persons in default.

I think our judgment must be for the plaintiff.

GWYNNE, J.—Upon the argument before us it was stated by counsel for the defendants that, although the defendants are by their constitution a Proprietary as well as a Mutual Insurance Company, yet they have never availed themselves of the privilege of raising stock capital; that, however, they insure upon the cash premium principle, that is, for cash once paid in full discharge of all liability; and they contend that all persons so insured are members of the Company and insured in the Mutual Branch; in a qualified sense, however, that is to say, that, although the defendants claim that they are insured in the Mutual Branch, yet they are not entitled to have their losses made good out of the

deposit premium notes given upon insurances effected strictly in the Mutual Branch, nor are they in any way liable to make good, or contribute to, the losses sustained by those insured upon the deposit premium note principle, and that, in fact, the only fund provided to pay the losses of those insured upon the cash premium principle is that which consists of the cash premiums themselves, and the profits derived from the investments thereof. The assertion of this contention has led me, with as much diligence as I am capable of, to review all the Acts of Parliament which I could find bearing upon the subject; for if the contention should prove to be well founded, I feared that some general observations made by me in *Ellis v. The Beaver Insurance Company*, which were not perhaps necessary for the decision of that case, but as applied to Mutual Insurance Companies in general, might require some qualification. The result of my investigation of the Acts of Parliament has been that the contention of the defendants is, in my judgment, untenable.

The leading principle of Mutual Insurance Companies, and that which constitutes their essential difference from Proprietary Companies, is, that each person whose property is insured becomes a member of the Company. The several members are, as the name indicates, insurers of each other; their capital consists of such amount of premiums as by their Act of Incorporation they are required to have subscribed before commencing business, the deposit notes given therefor, and for such other insurances as are effected from time to time by the increasing number of members, and of a lien upon the land and premises of each member upon which insurances are effected for the full liability of such member. The Act of 6 Wm. IV. ch. 18, passed for the purpose of authorizing the establishment of Mutual Insurance Companies in this Province, kept the fundamental principles upon which such Companies came to be established scrupulously in view, and it is, I think, much to be lamented, having in view the security of those insuring, that the Legislature should have ever sanctioned

any real or apparent departure from those fundamental principles.

By the 4th sec. of the Act it is enacted that no such Company shall be formed until at least forty or more freeholders in a given district shall bind themselves to insure property to the amount among them of at least £10,000; by the 6th sec., that every insurer should be a member of the Company during the continuance of his policy; by the 12th, that every person, on becoming a member by insuring, should deposit his promissory note for such a sum of money as should be determined by the Board of Directors, a part of which, not exceeding five per cent., should be payable immediately, and the residue, when required by the Board, from time to time, for payment of losses and expenses; by the 13th sec., that every member of the Company shall bear and pay his proportion of all losses occurring during the continuance of his policy, and that the buildings insured, and the lands whereon they should be erected, and so much other adjoining land as should be mentioned in the policy, should stand pledged to the Company for the payment of such proportion of losses, and that the Company should have power to sell, demise, or mortgage the land to realize the same; by the 16th, that, in addition to the amount of the deposit notes, if they should prove deficient, every member should be liable to pay the further sum, not exceeding at any time, for any loss, the sum of one per cent. on the amount insured by each member respectively. By the 17th sec., the period for the duration of a policy was limited to seven years. By the 19th sec., provision was made for the assignment of a policy to the assignee of the land upon which the property insured was situate, and it enabled such assignee of the policy to have the same ratified and confirmed to his own use and benefit, and it declared that, by such ratification and confirmation, the assignee should be entitled to all the rights and privileges, and be subject to all the liabilities, to which the original party insured was entitled and subjected under that Act.

Now, throughout this Act, the idea is not presented of any person effecting an insurance by paying a cash premium at the time of the insurance to cover his liability in respect of, or the consideration for, the insurance effected.

By 4 & 5 Vic. ch. 64, the extent of the districts within which the Companies formed under 6 Wm. IV. might take insurances was enlarged, and for the like purpose 12 Vic. ch. 86 was passed. Up to this time no such idea had been suggested of authorizing Mutual Insurance Companies to issue policies upon the principle of receiving cash payments, in full of premiums upon the issue of the policy. While such was the general law authorizing the constitution of these Companies, certain persons petitioned to be incorporated as a Mutual Company, and also as a Stock or Proprietary Company, and accordingly 14 & 15 Vic. ch. 163, incorporating the defendants as The Canada West Farmers' Mutual and Stock Insurance Company, was passed. By that Act, sec. 2, the stock of the Company was divided into, and was declared to consist of, "*two separate and distinct descriptions, namely, Mutual and Proprietary,*" the Mutual Stock being "composed of premium notes deposited for the purpose of Mutual Insurance, together with all payments and other property received or held thereon, or in consequence of such Mutual Insurance; and the Proprietary Stock being composed of stock in shares subscribed and paid for the purpose of Fire Insurance to others, which Proprietary Stock shall not exceed £100,000 divided into shares of £20 each; *and also*, that the members of or persons composing the said Company shall in like manner consist of and be divided into two classes, namely, those who deposit premium notes for the purpose of Mutual Insurance, *denominated Mutual Members*, and Proprietary Members, or those who hold shares in the Proprietary Stock of the said Corporation." Besides authorizing the defendants to insure upon the Proprietary principle, their Act of Incorporation authorized a very material departure from the principles of Mutual Insurance, as sanctioned and recognized by the General Act, for,

although in sec. 21 it retained the lien upon the lands of insurers in the Mutual Branch, to the same extent as the General Act had done, as a security for the payment by insurers of their ratable proportion of losses, yet it limited the liability of the insurers by express enactments to the amount of the deposit notes; and it provided, in sec. 23, that if ever it should happen that the whole amount of the deposit notes should be insufficient to pay the loss occasioned by any one fire or fires, in such case the sufferers insured should receive, towards making good their respective losses, a proportionate dividend of the whole amount of such deposit notes, according to the sums by them respectively subscribed. The utmost capital of the Mutual Branch being, in the contingency by this section provided for, exhausted, one would naturally have supposed that such exhaustion of the total capital would have so pervaded the whole body corporate, (in so far as its *Mutual* Insurance existence was concerned,) as to cause the demise of that branch; but, by a strange contradiction, the section, notwithstanding the total exhaustion of the Mutual Branch capital, seems to have contemplated the continued existence of that branch, for it preserves a clause, to be found in the General Act, applicable to the continued liability preserved by that Act *in excess* of the amount of the deposit notes, which provides that, after payment of the whole of the deposit note by an insurer, he shall nevertheless not be discharged from the Company, except upon a surrender of his policy *before any subsequent loss has been incurred*. Now, if the payment of the whole of the deposit notes should be effected in answer to a call to meet losses which exceeded the total amount of the deposit notes, how can the policies be deemed to continue in existence when no proper liability remains upon any of the insurers to contribute any further towards any future loss?

In this Act, neither do we find, any more than in the General Act, any idea suggested of an insurance being effected in the Mutual Branch for cash once for all paid at

the time of effecting the insurance; and, in so far as the Proprietary Branch was concerned, it was unnecessary to say, that in that branch the Company might take cash premiums, for such premiums are naturally incidental to insurances effected upon the Proprietary principle. It may perhaps be said that the Act contains a compensating clause for that which limits the liability of the insurers to the amount of their deposit notes, although the compensation can, I think, scarcely be said to be adequate, for it provides that Mutual Branch Insurances shall not be effected for more than two-thirds of the value of any building, nor shall more than £500 be involved in any one risk, and that no Mutual Insurance shall be effected on buildings or other property situate in blocks or exposed parts of towns or villages, nor on any kind of mills, carpenters' or other shops which, by reason of the trade or business followed, are rendered extra-hazardous, or machinery, breweries, distilleries, or other property involved in similar or equal risk. This Act contained no limitation requiring any amount of stock to be subscribed for in the Proprietary Branch, or any number of persons to agree to insure in the Mutual Branch before entering upon the business of insurance. The directors named, without themselves being stock holders or insurers, are at liberty to enter upon their business as soon as they could get any person to accept a policy from them.

The Act 22 Vic. ch. 46 was passed to amend the General Acts relating to Mutual Insurance Companies, by which all Mutual Insurance Companies incorporated under the General Act were empowered to raise, by subscription of its own members, or of some of them, *or by the admission of new members not being assured by the Company*, what is called a Guarantee Capital, not exceeding \$500,000, which capital should be liable for all losses, debts, and expenses of the Company. It was declared that the subscribers of such capital stock should have such rights in respect of their stock as the Directors of the Company should declare and fix by a by-law *to be passed before such*

capital shall be raised, and which should not thereafter be repealed without the consent of the majority of the votes of the shareholders of such capital; but it was provided that the Company should have power to create from the surplus profits of the Company, from year to year, a reserve fund for the purpose of paying off the Guarantee Capital, after which payment the affairs and property of the Company should revert to and be vested in the parties named as the sole members of the Company. By the 4th section of the Act, it was enacted that any such Company should have power to collect premiums in cash for insurance, for terms not longer than one year, and that, after providing for the reserve fund aforesaid, the Company should have power to make a periodical division of the profits of the Company equitably among the stock holders and policy holders of the Company; and although the Companies having such intended powers given to them were authorized by by-law once for ever to change the name of the Company, yet it was provided as a condition that the appellation of "Mutual" should be retained. The effect of this Act, as it seems to me, was, while insisting that whatever name the Companies should give to themselves respectively, they should retain the appellation of "Mutual" to divest them of their peculiar character of Mutual Insurance Companies, and to invest them equally with powers as a Stock or Proprietary Company, with a provision that, when the reserve fund derived from profits should equal the subscribed capital or Proprietary Stock, the shareholders should be paid off and the reserve fund should remain as a guarantee fund to secure the payment of all the losses of the Company, which should revert to its original character of a Mutual Insurance Company, in which all the insurers are members, having in itself a reserved capital created which it might use in effecting Proprietary insurances. The insurance for one year for a cash premium would then seem to be an insurance authorized to be effected in respect of the stock subscribed, and not to be a new feature possessing

no mutuality imported into the Mutual principle. It was, I think, scarcely intended that a person holding a policy, as insured for one year, should be a participator in the periodical division of profits with not only the shareholders in the subscribed capital, but with those insured upon the Mutual principle, though not liable equally with the latter. The insured for a year upon the cash principle, having paid his cash premium once for all, could not well be subject to any further liability, while the insured in the Mutual Branch, although he should insure only for a year, was subject to calls in excess of his deposit note, in proportion to the amount of his insurance, to contribute to the payment of the losses of others insured in the same branch. The principle of mutuality would require that, as the insured for a year for a cash premium once paid, could not be called upon to contribute to any loss occurring within the year among those insured upon the deposit note principle, so neither should the latter be liable to assessment to pay the losses of the former; and so they cannot both be deemed to be insured in one and the same Mutual Branch. The division of profits, one would think, was to be among the stock holders, whose stock capital constituted primarily the fund for securing to the insured for a year, upon a cash premium, payment of his losses, and the policy holders in the Mutual Branch who, by reason of their mutual liability character, were members of the Company equally with the stock holders. Then, again, with reference to the lien upon the lands of those insured in the Mutual Branch, that clause could not apply to the person insured for the year for cash, whose cash payment exhausts his liability; and there can be no reason for the land being made a security to the Company for a liability which does not exist. There seems to be such an incongruity in treating a person insured for a year, for a cash premium, once paid in discharge of all further liability, as mutually insured with one whose liability is to contribute ratably, in proportion to the amount of his own insurance, for the losses of others,

although, to meet those losses, calls in excess of the amount of the deposit note should be necessary, that I must say it seems to me that the authorization by this Act, of an insurance for a cash premium, for a period not exceeding one year, is referable to the principle of a Proprietary or Stock Insurance Company, and not to that of a Mutual Insurance Company, or to the Mutual Branch in a Company authorized to insure upon both principles. In 24 Vic. a further Act, ch. 47, was passed to amend the Act respecting Mutual Insurance Companies, which, with the provisions of 22 Vic. ch. 46, was consolidated in consolidated Statutes of Upper Canada, ch. 52. By 24 Vic. ch. 47, it was enacted that the insured in Mutual Insurance Companies should be no longer liable (upon default to pay an assessment upon their deposit note) to be sued for the whole amount of such note, but that the assessment, with interest, should be recoverable in the Division Court. Then, on the 30th of June, 1864, three Acts were passed, being respectively 27 and 28 Vic., chapters 38, 99, and 101. Chapter 38 was intituled, "An Act to amend the Act respecting Mutual Insurance Companies." It amended the 31st section of Consolidated Statute, ch. 52, which was the 1st section of 22 Vic. 46, which first authorized Mutual Insurance Companies to raise a stock capital, by enacting that the Directors of any Mutual Insurance Company, incorporated under the General Act, might pledge as much as, but not more than, two-thirds of the premium notes belonging to said Company as security to the subscribers of such Guarantee Capital; and it enacted further, that Mutual Insurance Companies incorporated under the Act might effect contracts of re-insurance with any other Company, thereby introducing another feature alien to the principle of Mutual Insurances.

The 99th chapter was intituled "An Act to grant certain powers to the Beaver Mutual Fire Insurance Company. This was a Company formed under the General Act, as consolidated in 22 Vic. ch. 52, and it had therefore the powers conferred by 22 Vic. ch. 46, as amended by 27

& 28 Vic. ch. 38. They appear to have desired notwithstanding to obtain a special Act, and accordingly this chapter 99 was passed, by which it was enacted that they might issue policies and collect premiums thereon in cash for insurance for terms of two or more years, and that parties so paying in cash should not be liable to any further charge or assessment, nor should they be held to be members of the Association in any respect.

The Association was further authorized to form a reserve fund, to consist of all moneys which should remain on hand in each or any year, after paying the ordinary expenses and losses of the Association, and for that and other purposes of the Association, that the Directors might levy an annual assessment on the premium notes held by the Association, and that such reserve fund might be applied either to pay off the Guarantee Stock authorized by the General Act, if the Directors should so determine, or to pay such other liabilities of the Association as could not be provided for out of the ordinary receipts for the same or any succeeding year, provided that no assessment for any amount over and above one-third of a dollar on each hundred dollars of insured property should be levied in any one year, unless or until the whole of such reserve fund should have become exhausted. They were further authorized to effect contracts of reinsurance of risks with any other Company, and they were further authorized to issue policies of insurance upon the lives of horses, cattle, or live stock of any kind, provided that no such policies should be issued for terms exceeding two years, and the holders thereof should not be members of the Company. Proprietors of Guarantee Stock to the amount of \$200, upon which ten per cent. was paid up, were qualified to be Directors without being insurers in the Association, that is, without being members of the Mutual Branch.

This Company then became a Proprietary as well as a Mutual Fire Insurance Company, and also a Horse, Cattle, and Live Stock Life Assurance Company. Neither the holders of the life policies on cattle nor of the fire policies

issued for cash premiums were in any respect members of the Association, or interested in the Mutual Branch; they had no claim upon the Mutual members for satisfaction for their losses; they must have looked either to the subscribed capital stock, or to the profits arising from the cash premium Fire policies and the Live Stock Life Assurance policies, for their satisfaction of losses; they were in every respect separate and distinct from the Mutual Branch and its members. The chapter 101, which was passed on the same day, was intituled, "An Act to Grant Certain Powers to the Canada West Farmers' Mutual and Stock Insurance Company." This Company having, as we have seen, been originally incorporated as a Proprietary Stock as well as a Mutual Insurance Company, required no clause similar to that in 22 Vic. ch. 46, consolidated as sec. 31 in 22 Vic. ch. 52, Consolidated Statutes, to enable it to raise stock capital, and accordingly we find no such clause inserted in this Act; but this chapter 101 does authorize the Company, for the purpose of equalizing the assessments which it was authorized by law to make upon its deposit premium notes, and of providing for the speedy and certain payment of losses incurred, and for expenses of management, to raise an equalization or reserve fund, *by assessing its premium notes* in such manner and at such times as should appear most expedient to the Directors, provided always that the sum to be paid by each member should be in proportion to his premium note, and should not exceed one per cent. for the three years' risk on the hundred dollars insured on isolated ordinary farm property until the whole equalization or reserve fund should be exhausted. By sec. 2 it was enacted that the Company might issue policies and collect premiums in cash for insurance for terms of one, two, or three years, as well as policies with a premium note; and in any such case, where a fixed cash rate is paid, the Company might dispense with a premium note. By the 3rd sec. the Company was authorized to raise money by issue of bonds, debentures, or promissory notes for payment of losses or the expenses

or other purposes of the Company, provided that the whole of such debentures, &c., at any one time outstanding should not exceed one-fourth part of the amount then unpaid on the deposit or premium notes held by the Company; and by sec. 6 it was enacted that the Directors might always assess upon the members of the Company, in proportion to the amount of their premium notes respectively, such sums as might be necessary to pay any such debentures, &c.

Now it cannot, I think, be conceived to be possible that the Legislature, in those two Acts relating to the Beaver Fire Insurance Company and the Canada West Farmers' Mutual and Stock Insurance Company, contemplated placing persons insured upon a cash payment upon a different footing in one of those Companies from that which the like persons occupied in the other. They did not intend that persons insured upon the payment of a cash premium in the Beaver Mutual should not in any respect be members of the Mutual Association, and that the like persons in the Canada West Farmers' Mutual should be. It is incompatible with the characteristic difference of the Mutual Branch that they should be, and this chapter 101 equally, to my mind, as chapter 99, shews that the legislature never contemplated that a person insured in any of these Insurance Companies for a cash premium should be a member of the Mutual Branch, or be subject to the liabilities or be entitled to the privileges of such a member. The 6th sec. of this chapter 101, as well as sec. 2 of 14 & 15 Vic. ch. 163, shews who are the members of the Company, namely, those who had given deposit premium notes, or had been insured as members, that is, in the Mutual Branch; for it provides that the debentures which the previous section had authorized to be issued in a given proportion to the deposit premium notes, should be paid by assessments *made on the members of the Company in proportion to the amount of their premium notes respectively*; so that the members are those only who have given deposit or premium notes, and

not in any respect those who have paid in cash, which payment once made discharges the party making it from all liability.

The next Statute affecting the subject is 29 Vic. ch. 37, which appears to relate to all Mutual Insurance Companies, whether formed under the General Act or by special Act of Incorporation. It enacts that any suit cognizable in a Division Court, upon or for any premium or deposit note or notes, or any sum assessed or to be assessed thereon, or upon or for any note or notes given or to be given for cash premiums of insurance to such Company, or to any of the officers or agents thereof, may be tried and determined in the Court for the Division in which the Head Office of such Company is situate; and by sec. 5, in case any note given or to be given for a cash premium of insurance to such Company, or any sum that may hereafter be assessed upon a premium or deposit note given or to be given to such Company, shall remain in arrear and unpaid for thirty days after the same shall be payable, the policy of insurance held by the persons in default shall thereupon become absolutely null and void, but nevertheless such person shall remain liable to such Company for the amount so in arrear and unpaid, provided that, in all future policies to be issued by such Company, this section shall be written and endorsed thereon.

Now, why a note should be taken at all where a cash payment is agreed upon, or why, if taken, such a serious penalty should be attached to its non-payment as here is provided, seems strange. I fear that the experience of the Courts might not unreasonably suggest that not infrequently such Companies prefer taking the note to the cash, and let it lie by for a while and avail themselves of the forfeiture in case of loss, and enforce notwithstanding, payment of the note. It is not for us to question the wisdom of the Legislature, which, while it entails on the insured the forfeiture of his policy as a consequence of *non-payment* of the premium, secures at the same time to the Company insuring, payment of the premium in full,

with interest, perhaps, also, if at least the Company should, as it most probably would, have the note made payable with interest: all that we have to do is to dispense the law as we find it; but, in dispensing it, we will, before pronouncing the judgment in favor of such a forfeiture, require the Company appealing to the law to bring themselves within its very letter.

We have then a further Act affecting the defendants in this suit. It is the Dominion Act, 31 Vic. ch. 93, passed on the 22nd of May, 1868, intituled, "An Act to amend the Acts relating to the Canada West Farmers' Mutual and Stock Insurance Company, and to change the name of the Company to the Canada Farmers' Mutual Insurance Company." By this Act the Company was empowered to transact its business as an Insurance Company in all places within the Dominion of Canada, and by sec. 6 it was enacted that the Act should be subject to the provisions of any General Act regulating insurance which might be made applicable to Companies of the same class with that whose Act of Incorporation is hereby amended, to be passed in the present or any future session of Parliament.

Now, on the same 22nd of May, 1868, an Act was passed of the character described in this sixth section, namely, 31 Vic. ch. 48, intituled, "An Act respecting Insurance Companies." By that Act it was enacted that all Insurance Companies, except Companies transacting in Canada, Ocean Marine Insurance business exclusively, should make deposits with, and receive a license from, the Finance Minister, to enable them to carry on the business of insurance. This deposit was, by the fourth section, directed to be made before the issue of the license, except in the cases of Companies incorporated before the passing of the Act, by any Act of the Parliament of Canada or of the Legislature of the late Provinces of Canada, Lower Canada, Upper Canada, Nova Scotia, or New Brunswick, or which might thereafter be incorporated by the Parliament of Canada, or by the Legislature of any Province of

the Dominion, and carrying on the business of Life or Fire Insurance, or of Inland Marine Insurance, or both the latter; which Companies might make such deposit, in three equal annual instalments, the first of which should be paid before the issue of the license, on or before the 1st day of August, 1869. By the 20th sec. of this Act it was enacted that any such Mutual Fire Insurance Company receiving cash or part cash premiums in lieu of premium notes, or accepting risks other than from its own members, should deposit in the hands of the Receiver General one-third of the cash premiums received by it, and if such Mutual Fire Insurance Company received no cash premiums whatever in lieu of premium notes, and act wholly and exclusively on the Mutual principle, it should not be bound to make such deposit. Now this is an Act, to which, by the defendants' own special Act, 31 Vic. ch. 93, they are expressly made subject, and they were all in force before the policy declared on in this case was effected. We have then here what appears to me to be a plain legislative declaration, accepted as conclusive upon this Company, that insurances effected for cash premium are effected not upon the Mutual principle, but upon a principle which is placed in contrast with it. I must therefore conclude that persons insured by these defendants upon the cash premium principle are not members of the Mutual Branch: they are not members of the Company at all.

Now this Company's original Act of Incorporation, 14 & 15 Vic. ch. 163, sec. 25, enacts, that where a house or other building insured shall be sold, *the policy of Mutual Insurance* shall be void, and shall be surrendered to the Directors of the Company to be cancelled, and upon such surrender the assured shall be entitled to receive his deposit note upon payment of his proportion of all losses and expenses that have occurred prior to such surrender, provided always that the grantee having the policy assigned to him may have the same ratified and confirmed to him, for his own proper use and benefit, upon application to the Directors, and within thirty days next after such

alienation, on giving proper security to the satisfaction of the Directors for such portion of the deposit or premium note as shall remain unpaid."

From this section it is plain that the policy, thereby authorized to be assigned in such manner that the assignee shall hold it in his own name, for his own proper use and benefit, and which therefore he may sue upon in his own name, as made with himself, is a policy of Mutual Insurance. The section does not apply to a policy issued for a cash premium already paid, which is not a policy of Mutual Insurance.

As this matter arises before us upon demurrer, we have nothing before us but what appears upon the Record. There the plaintiff declares upon the policy as a policy of Mutual Insurance, which, having been assigned to him, was within the 25th sec. of 14 & 15 Vic. ch. 163, duly ratified and confirmed by the defendants to him, to his own proper use and benefit. The defendants, admitting this to be the fact, plead in bar that a note given by the original insurer for the cash premium of insurance (treating the policy, although effected for a cash premium, still as a policy of Mutual Insurance) was in arrear and unpaid after the lapse of thirty days after it had become due, and insisting that, by the operation of 29 Vic. ch. 37, the policy is therefore avoided. To this the plaintiff replies that, at the time of the ratification and confirmation of the policy to him, the defendants withheld from him knowledge of the fact of there having been a note given, of which fact he had no notice until after the loss, and that the defendants ratified and confirmed the policy to him without requiring from him any security for the note, or for any amount of premium remaining unpaid. The policy, then, being alleged by the plaintiff and admitted by the defendants to have been ratified and confirmed to the plaintiff in manner aforesaid, the only point raised by the pleadings upon the demurrer is, whether or not the nonpayment of the note by the maker avoids this policy so ratified in the hands of the assignee, and I think that

it does not. The statute avoids the policy only, I think, in the hands of the person in default. The person in default was the maker of the note, not the plaintiff, who could not be in default in respect of a note to which he was no party, and the existence of which (a fact peculiarly in the knowledge of the defendants) was withheld from him. At the time that default was committed the person making default was not the holder of the policy: it was then the property of the plaintiff, to whom it had been ratified and confirmed by the defendants. If they so ratified it, without asking for and requiring security from him, that was their own neglect. It would be a hard case indeed, if, in such a case, they should be permitted to urge their own neglect as a ground of forfeiture of the rights acquired by the plaintiff by the deliberate act of the defendants themselves.

GALT, J., concurred with Hagarty, C. J.

PER CURIAM.—*Judgment for plaintiff on demurrer.*

WHITE V. AGRICULTURAL MUTUAL ASSURANCE CO.

Mutual insurance—Encumbrance—Defective pleading—Right to recover.

To an action on a mutual fire policy, defendants pleaded charging plaintiff with having represented that he held the premises in fee simple, not alleging that he made any statement as to encumbrances or outstanding equities, but merely negating the truth of his statement in this way, that "the plaintiff had not a title in fee simple," with this addition, "and the true title was not nor is expressed in said policy, or in the application:" *Held*, that on this issue plaintiff was entitled to recover, notwithstanding it appeared that there was an outstanding mortgage upon the property.

THIS was an action on a policy of insurance, alleging a loss by fire.

The defendants pleaded that they were a Mutual Insurance Company, of which plaintiff became a member, setting out a clause in the statute that if the assured had title in fee simple unincumbered, the policy would be

valid, but not otherwise; but if he had a less estate, or if the premises were encumbered, the policy should be void, unless the true title of the assured and the encumbrance were expressed therein and in the application therefor: *averment*, that by plaintiff's application for insurance, in the policy mentioned, which was by the policy made part thereof, plaintiff represented and set forth, among other things, that he held the premises on which the property insured were erected in fee simple: *averment*, that at the time of making said policy plaintiff had not a title in fee, and the same was not expressed in the policy or application, contrary to the statute.

Issue.

At the trial the plea was amended by adding "on equitable grounds."

The facts appeared to be that one Cornelius Johnson, being indebted to the plaintiff in the sum of \$2,000, conveyed the premises insured to the plaintiff by deed, bearing date 18th February, 1868. On the 30th November, 1868, plaintiff obtained the policy sued on, having in his application therefor stated himself to be the owner in fee. From a letter written by the plaintiff to the agent of the defendants, after the fire, it appeared that Johnson was indebted to plaintiff, and plaintiff being anxious for payment or security, it was arranged that Johnson should make a deed of his farm to plaintiff as security for his claim. The deed was accordingly made at the time it bears date, but no change of possession of the property took place until the following June or July, when the plaintiff assumed possession, and leased the farm to one Michael Welch. Although the plaintiff had obtained possession and leased the farm, it was the understanding between Johnson and him that he should reconvey the place to Johnson upon receiving the amount of his claim. It was in consequence of this understanding that Johnson interested himself in rebuilding a barn on the premises that had been burnt. There was no written agreement between the parties existing at the time when the application for the present

insurance was made ; but it was admitted that an understanding to that effect existed. After the policy had been issued, an agreement in writing, under seal, dated 29th May, 1869, was entered into between plaintiff and Johnson, whereby plaintiff agreed to sell to Johnson the land and premises in question for the sum of \$1640, payable on 1st June, 1874 ; “and it was further agreed between the parties that if default be made in fulfilling this agreement, or any part thereof, on the part of Johnson, then and in such case the plaintiff shall be at liberty to consider this contract as fulfilled and annulled.” There was no covenant in this agreement, on the part of Johnson, binding him to pay the \$1640.

In the application the following queries were contained :

“23. Applicant’s title ; held in fee, or how ?” “In fee.”

“24. Has there been, within two years, any question or dispute as to ownership ?” “No.”

“26. Is the property encumbered ? If so, state full particulars.” “Mortgaged to Messrs. B. & A., of Toronto, for \$800.”

“19. By whom occupied ?” “By tenant.”

The policy referred to the application, and that the premises were held in fee, and were mortgaged to Messrs. B. & A. to the extent of \$800.

The jury found in favour of the defendants, leave being reserved to the plaintiff to move to enter a verdict for him for \$371.

In Easter Term last, *McMichael* obtained a rule *nisi* accordingly, to which *Ferguson* shewed cause.

McMichael, contra.

HAGARTY, C. J.—Beyond the name of the defendants there is nothing either in the declaration or in the policy produced from which we could guess that this Company professed to insure on the “mutual” principle. The plea sets up that they are a company on this principle, and that plaintiff became a member thereof, and states a clause in

the statute that if the assured has a title in fee simple unencumbered, the policy would be valid, but not otherwise; but if he had a less estate, or if the premises be encumbered, the policy should be void, unless the true title of the assured, and the encumbrances on the premises, be expressed therein and in the application therefor; and that by plaintiff's application for insurance in the policy mentioned, which application was by the terms of the said policy made part thereof, the plaintiff represented and set forth, among other things, that he held the premises on which the said house and barn were erected in fee simple; and the defendants further say that, at the time of making the said policy, the plaintiff had not a title in fee simple to the said premises, and the true title was not nor is expressed in the said policy, or in the application therefor, contrary to the said statute.

I think, on the evidence before us, we should hold the defendants to the strictest proof of their defence, and not in any way extend its scope.

The representation they charge the plaintiff with making is, that he held the premises in fee simple. They do not say that he made any statement as to encumbrances or outstanding equities. The negative of the truth of his statement is simply that, at the making of the policy, "the plaintiff had not a title in fee simple," adding, "and the title was not nor is expressed in said policy or in the application."

I see nothing involved in this issue but the one point, viz., seisin in fee simple or the contrary.

This is not a question of pleading, but of proof for the determination of a specific issue. I think the issue is not one on the allegation that the true title was not expressed in the policy or application, but the latter is merely a deduction, as it were, from the proposition advanced thus: "You said you were seised in fee; you were not in truth seised in fee; and so, to that extent, the true title was not expressed in said policy or application."

I think, at the trial, I should have so construed the issue,

and an amendment would have been necessary to have let in additional allegation that plaintiff, although seised in fee, was only so seised that he had a mere mortgage title, and the estate was virtually in another person.

I see nothing in the evidence to raise even a suspicion that anything is wrong or unjust in the plaintiff's claim : there is no over-valuation or evil practice, nor any reason suggested, apart from the purely legal question, why the plaintiff should not recover.

In my view of the case, it is unnecessary to consider the questions suggested as to the effect of Johnston's undoubted equitable rights on the facts set out in plaintiff's letter, or as to the allegation in the plea, that plaintiff became a member of the Company, or the application to him of all the clauses in the Mutual Insurance Acts.

I hold the plaintiff entitled to recover, on the ground that his evidence was sufficient to prove in his favour the only issue raised by defendants on this record.

GWYNNE, J.—The defendants, by their plea, allege that they are a Mutual Insurance Company, incorporated under the General Act Consolidated Statute, 22 Vic. ch. 52, and that the plaintiff, *under and by virtue of the policy* declared on, became and was a member of the said Company, and subject to the provisions of the said Act, and they allege matter which they contend constitutes a breach of the provisions of sec. 27 of the said ch. 52. The form which the consolidation of the Acts has taken has separated that clause from its natural context, which is to be found in sec. 67, which shews the object to be to give to the Company a lien upon the property insured, to meet the liabilities of the insured for his proportion of any losses or expenses accruing to the Company during the continuance of the policy ; and this lien, as I have shewn in *Storms v. The Canada West Farmers' Mutual*,* in which judgment has been given, this present term, is attachable only upon policies of Mutual Insurance, in which policies, and in which only the insured do become members of the

**Ante*, p. 75.

Company, and liable as such to contribute to the losses of the Company. Such lien has no place in the case of a policy issued for a cash premium of insurance, which, being once paid, discharges the insured from all liability, the persons insured upon this principle not being in virtue of their policies members of the Company, or liable to any future demands or liabilities.

The policy being produced in this case, shews that it was not a policy of Mutual Insurance, but that it was issued upon the cash premium principle, which premium is by the policy acknowledged to have been paid, and the policy itself has endorsed on it a notice to the insured, which declares the effect of a policy issued for a cash premium as follows: "In the cash system the premium note is wholly dispensed with, and the assured is under no liability beyond the premium he has paid." Now, with this declaration endorsed by the defendants themselves upon this policy, how can it be contended that, in virtue of the policy, the Company have, under the provisions of the Mutual Insurance Companies' Act, a lien on the land of the insured to secure liabilities which do not exist? The defence which is set up by the plea being rested upon a clause in the statute, which, in my judgment, relates to policies of Mutual Insurance only, and this policy not being such a policy, the plea which alleges that the plaintiff, under and in virtue of his policy, became a member of the Company, and subject to the provisions of the Act which is pleaded in bar to his recovery, is not proved, but, on the contrary, is disproved by the production of the policy. The verdict, therefore, should be set aside and judgment entered for the plaintiff. If the policy had been a policy of Mutual Insurance, although undoubtedly the plea does not raise as pointedly as it might the true objection to the plaintiff's title, yet I could not, without further consideration, concur in holding that the plaintiff's representation that his title was a fee simple title, subject to a mortgage for \$800, was not substantially an averment that his title was a fee simple, absolute, free

from incumbrance, except the stated mortgage, or that such a representation was not falsified, upon it appearing that his title, although apparently a legal fee simple, was in fact such that, upon a bill filed in equity, it would be declared to be only a mortgage security.

GALT, J., concurred.

Rule absolute to enter verdict for plaintiff.

WEAVER V. BURGESS ET AL.

Crown deed—Married woman—Tenancy by the curtesy—Entry unnecessary.

Where a married woman claims under letters patent from the Crown, her husband need not have entered upon the land in order to entitle him to tenancy by the curtesy, the letters patent, *suo vigore*, constituting seisin in fact.

EJECTMENT for lot number 32, in tenth concession of Vaughan.

Plaintiff claimed as heir-at-law of the patentee of the Crown.

Defendant Burgess defended for 36½ acres of the east half of the lot, 1st, by deed from one William Graham; and 2nd, by length of possession.

Defendants Dick and wife defended for other 63½ acres, residue of the east half of the lot, in right of Mrs. Dick, 1st, as heiress-at-law of William Graham, deceased; 2nd, by deed from James Coldwell to Sarah Dick (the wife); and 3rd, by over twenty years' possession in Dick and his wife, and Graham, the father of Mrs. Dick, and in those through whom they claimed.

The other defendants, infants, by their guardian, defended for the west-half of the lot, as heirs-at-law of Thomas McWade, deceased.

At the trial, before Gwynne, J., at the assizes for the county of York, held in the spring of 1871, it appeared that by letters patent under the great seal of the Province

of Upper Canada, bearing date the 25th day of November, 1809, the whole lot number 32, in the tenth concession of Vaughan, was granted to Louisa Stephenson, daughter of the late Captain Francis Stephenson, a United Empire Loyalist, her heirs and assigns, in fee simple; that Louisa Stephenson, the grantee of the Crown, was married to Jeremiah Weaver, in the year 1812 or 1813; that the plaintiff was the eldest son, but the second child, issue of that marriage, and that he was born on the 16th May, 1816; that by an indenture, bearing date the 9th November, 1815, after the birth of Mary Theresa, the eldest child and issue of the above marriage, and purporting to be made between Jeremiah Weaver and Louisa, his wife, of the one part, and William J. Kerr, of the other part, said Jeremiah Weaver granted unto said William J. Kerr, in fee, said lot number 32 in the tenth concession of Vaughan, and also lots numbers 15 and 30 in the third concession of the township of Etobicoke, with the appurtenances and reversion and reversions, &c., and all the estate, right, title, interest, claim, and demand whatsoever, of him the said Jeremiah Weaver, of, in, to, or out of the same: *Habendum* to the use of the said William J. Kerr, in fee; and said Louisa, wife of said Jeremiah Weaver, in consideration of ten shillings, barred her dower. This deed appeared to have been registered in the Registry Office of the county of York on the 12th March, 1816. It was admitted that if this deed had passed the estate of Louisa Stephenson, the grantee of the Crown, the titles of the respective defendants were good, but, on the part of the plaintiff, it was contended that the estate of the grantee of the Crown was not affected by this deed.

It was contended also, on the part of the defendants, that there being no evidence of the grantee of the Crown, or of her husband, during her lifetime, having made an actual entry on the lot, the husband took no estate by the curtesy, and that therefore the plaintiff's right of entry was now barred, his mother having been proved to have died in 1832. For plaintiff it was contended that Jere-

miah Weaver, father of plaintiff, had an estate by the curtesy in the land, and that plaintiff's right of entry first accrued at his death, which was proved to have taken place between the spring of 1852 and the autumn of 1853.

In Easter Term last, *Harrison*, Q.C., obtained a rule *nisi*, on leave reserved at the trial, to enter a verdict for the defendants, for the respective portions of the land for which they severally defended.

Becher, Q.C., shewed cause, citing *Co. Litt.* 16*a*, note 4; 2 Washburn, 525.

Harrison, Q.C., and *McMichael*, contra, cited *Doe Pettit v. Ryerson*, 9 U. C. 276; *Malloch v. Derivan et al.*, 22 U. C. 54; *Turley v. Williamson*, 15 C. P. 538; *Davis v. Henderson*, 29 U. C. 344; *Wigle v. Stewart*, 28 U. C. 427.

GWYNNE, J., delivered the judgment of the Court.

In the present state of the authorities in our own Courts, if the deed which has been put forward in this case by the defendants, had been a deed purporting to grant the estate of husband and wife, and had been executed by both, but not acknowledged, so as effectually to pass the estate of the wife, and if such deed had been executed since the passing of the statute 1 Wm. IV., and if the case depended upon the effect to be given to such a deed in passing or not passing the land during the coverture, we should, I apprehend, be obliged to follow the express decisions of this Court in *Meijers v. Greeley* and *Farquharson v. Morrow*, whatever our own individual opinion might be, leaving the parties to test the authority of those decisions in the Court of Appeal; but this case does not turn upon the construction to be put upon, or the effect to be given to, any such deed. The deed of the 9th November, 1815, though purporting to be made between Jeremiah Weaver and Louisa, his wife, of the one part, and Kerr, of the other part, and although executed by the wife, does not profess to be a grant, bargain, and sale by husband *and* wife: the deed expressly states that the husband *alone* grants, bargains:

and sells the lands mentioned in the deed, and all his estate, right, title, interest, claim, and demand whatsoever therein (treating the lands as his own); and Louisa, the wife, executes the deed, not with the view of granting her fee simple estate in the land in question, but for the purpose of barring her dower in the land stated in the deed, treating them all as the fee simple estate of the husband alone. The deed is, in fact, just such a deed as husband and wife would execute of the husband's lands. Upon the authority of *Allan v. Levesconte*, (15 U. C. 9), and *Robertson v. Norris* (11 Q. B. 917), we think there can be no doubt entertained that the deed in question passed the estate which, by the marriage, the husband acquired in the wife's lands: that was, an estate during the joint lives of himself and his wife; but inasmuch as that estate terminated upon the death of the wife in 1832, it becomes necessary to enquire whether Jeremiah Weaver had an estate by curtesy in his wife's lands, for if he had not, then the right of the plaintiff to make an entry, except in so far as the 3rd section of 22 Vic., ch. 88, Consol. Stat. U. C., applies, would have first accrued to the plaintiff, as heir of his mother, upon the death of his mother, if any one had then been in possession, and when, as appears by the evidence, he was under age, being only sixteen; whereas if the estate by curtesy did exist, the heir's right of entry first accrued upon the death of Jeremiah Weaver, the plaintiff's father, which having happened between the spring of 1852 and the fall of 1853, the present action is brought in time to entitle the plaintiff to recover. Whether the deed of the 9th November, 1815, conveyed the husband's estate by curtesy, so as to entitle the grantee to the benefit and enjoyment of the land during that estate, upon its becoming consummate by the death of the wife, it is not necessary to enquire; for if an estate by curtesy existed, the right of entry by the heir of the wife did not accrue until its determination, whether the right to the enjoyment of it was in Jeremiah Weaver, the husband, or in his grantee. Upon the part of the defendants it is

contended that there was no estate by the curtesy ever in Jeremiah Weaver, for the reason that, as was contended, to create such an estate it was necessary that there should have been proved to have been an *actual* entry upon the land, and actual possession had by husband and wife, or by the husband, or some one for him, during the coverture. Upon the other hand, upon the part of the plaintiff, it was contended that a title acquired by letters patent from the Crown involves such actual seisin in fact and in law as will constitute the husband, there having been issue of the marriage, tenant by the curtesy. Assuming an actual entry to be necessary to constitute such an actual seisin as is required to enable the husband to take an estate by curtesy in lands whereof his wife during the coverture was seised under and in virtue of a grant by letters patent from the Crown, we should hesitate in holding that it formed part of the case of the heir, claiming as heir of the mother, to establish such an entry and seisin affirmatively, and not rather part of the defendant's case, in bar of the plaintiff's right to recover, to prove that husband and wife had no possession during the coverture. Where the title of the wife originates in a deed or in record, as in the case of letters patent, and not in descent, it seems but reasonable that it should be presumed that seisin in fact followed the seisin in law until the contrary be proved. When, therefore, a deed is produced shewing the fee simple in the wife, it would seem to lie upon the defendant to shew that husband and wife had not actual possession during the coverture, by shewing that some one else had; and if it should appear that the person whose possession was so set up originated in an entry in virtue of a deed executed by the husband passing the estate which he had by the marriage acquired, it seems but reasonable to hold that such an entry, although made before any issue of the marriage born, and so before there could be any estate by curtesy initiate, would constitute such an actual seisin made under and on behalf of the husband during the coverture as would be sufficient, when issue should be

born, to constitute the estate by curtesy initiate; but it appears to me to be unnecessary in this case to determine from which side evidence of husband and wife having or not having had actual possession during the coverture, should come, for we are of opinion that a wife, whose title originates, as in this case it does, in a grant by letters patent from the Crown, such title continuing after the coverture, has, in virtue of the letters patent, such seisin in fact as well as in law as supports the estate by curtesy in the husband.

A passage has been cited to us in 2 *Washburn* on Real Property, 525, wherein it is said that a grant of land by the Government is tantamount to a conveyance with livery of seisin; and *Enfield v. Pernot* (8 New Hampshire Rep. 616), and *Enfield v. Day* (11 New Hampshire Rep. 525), are cited in support of the dictum. These decisions, though not binding authorities upon us, would be entitled to the greatest respect, as being the judgments of Courts deriving their laws from the same fountain-head as we ourselves do. We are not, however, left to rest our judgment upon the authority of foreign tribunals, for a reference to the same source, and the decisions of our own Courts lead us to the same conclusion. Livery of seisin, without which a deed of feoffment created but a mere estate at will, was, as *Blackstone* explains, no other than a pure feudal investiture or delivery of corporeal possession of the land or tenement, which was absolutely necessary to complete the donation; and an estate was then only perfect when *fit juris et seisinæ conjunctio*. "At a time," he proceeds to say, "when writing was seldom practised, a mere oral gift at a distance from the spot that was given was not likely to be either long or accurately retained in the memory of bystanders who were very little interested in the event. Afterwards, investitures were retained as a public and notorious act, that the country might take notice of and testify the transfer of the estate, and that such as claimed by other means might know against whom to bring their actions." The object, then, of livery of

seisin, was to give notoriety to the transfer. But livery of seisin never accompanied a grant from the Crown to the subject. Notoriety to the transfer was obtained, and evidence of the transfer preserved, by a different mode. So *Plowden*, 213, says, "It would be inconvenient, and beneath the dignity royal, for the law to make the King give livery in proper person to a subject, and, besides, livery of seisin is a matter of fact, which the King cannot do, *for his acts ought to pass by matter of record*, which is suitable to His Majesty, and therefore the land shall pass by the King's letters patent only by the course of the common law;" and that has been so held where the lands granted by the King were lands the title to which accrued to him in his natural capacity, and not in right of his Crown. Accordingly, our own Court of King's Bench, in 1826, in *Clench v. Hendricks* (Taylor's Rep. 403), expressly held that "the King's letters patent operate like a deed of feoffment with livery of seisin, and completely pass the estate, and the grantee is in actual possession by virtue of the patent;" and it was therefore held that the grantee of the Crown could maintain trespass without entry. Moreover, the actual seisin referred to in Co. Litt. as an essential requisite to the existence of estate by curtesy, is such a seisin as makes a stock of descent; for *Litt.*, 40 *a*, says: "And memorandum, that in every case where a man taketh a wife seised of such an estate of tenements, &c., as the issue which he hath by his wife, may by possibility inherit the same tenements, for such an estate as the wife hath, as heir to the wife, in this case, after the decease of the wife, he shall have the same tenements by the curtesie of England, but not otherwise." *Coke's* comment on the above words, "as heir to the wife," is: "This doth imply a secret of law, for except the wife be *actually* seised, the heir shall not make himself heir to the wife; and this is the reason, that a man shall not be tenant by the curtesie of a seisin in law." In the wife's fee simple estate, then, the husband, upon issue of the marriage being born, became entitled to an estate by curtesy, when the issue of

the marriage took, or could take, the inheritance from the wife as her heir; but this he did not do where the estate *descended* to the wife; unless there had been an *actual* seisin during the coverture; but where the land did not *descend* to her, but was granted to her by letters patent from the Crown, her title accrued by purchase, and she became the original stock of descent, and her issue must inherit from her, and from her only, whether any actual entry had been made upon the lands granted during her life or not. As grantee of the Crown, therefore, a married woman has, in virtue of the letters patent, that seisin in law and in deed, which is necessary to the existence of an estate by the curtesy. Mr. Justice Williams, it is true, in an essay upon the effect of the Real Property Act, 3 & 4 Wm. IV. ch. 106, upon the estate by curtesy, suggests a different reason for the rule requiring actual seisin to entitle the husband to his curtesy; namely, that the wife might not suffer by his neglect to take possession of her lands, and, in order to induce him to do so, the law allowed him curtesy of all lands of which an actual seisin had been obtained, but refused him his curtesy out of such lands as he had taken no pains to obtain possession of." We think, however, we cannot err by adhering to the text of Littleton and the commentary of Coke. We have, moreover, the express authority of our own Court, in *Clench v. Hendricks*, that letters patent from the Crown transfer the actual seisin equivalent to a feoffment with livery of seisin. We conclude, therefore, that upon the death of Mrs. Weaver, in 1832, the land passed to her husband as tenant by the curtesy for his life, and the inheritance, subject to the estate of the husband, descended to the plaintiff. It was argued that the language of the 3rd section of ch. 88, of Consolidated Statutes of Upper Canada, shews that the Legislature deemed residence upon land, or cultivation of it, alone to constitute actual possession, and from thence it was contended that letters patent only gave seisin in law; but a critical examination of the Act seems to lead to the conclusion merely that the term "actual possession" is

given a special meaning in relation to the application of the Statute of Limitations. In the 2nd section it is provided that the right to bring an action to recover land shall be deemed to have first accrued when the person claiming such land, or some person through whom he claims, having been in possession, has been dispossessed or has discontinued possession, at the time of such dispossession or discontinuance of possession; but section 3 provides that in the case of lands granted by the Crown, of which the grantee has not taken actual possession *by* residence or cultivation, and some other person, not claiming to hold under the grantee of the Crown, has entered upon the land, when in a state of nature, then the right to bring the action by grantee of the Crown shall not be deemed to have accrued until it shall be shewn that the grantee of the Crown, or person claiming under him, had notice of the land being in the actual possession of such other person; in other words, that the entry upon lands in a state of nature shall not constitute a *dispossession* of the grantee of the Crown without notice brought home to him of such entry and possession by the stranger; nor shall non-residence or non-cultivation by such grantee of such land constitute a *discontinuance* of possession within the 2nd section; but that if the grantee of the Crown, or person claiming under him, had ever resided on the lot, or cultivated it, then the entry of a stranger would constitute dispossession, and the grantee of the Crown, and those claiming under him, would also become subject to the consequences attached to discontinuance of possession.

If we should be of opinion that Jeremiah Weaver had no estate by curtesy in the land in question, the right of the plaintiff to recover would have depended upon the question, whether or not he had, and if he had, when first, notice of the land having been in the occupation of the defendants, or any of them, or of those through whom they claim. His right to recover the west-half would have been undoubted, for there is no evidence whatever of any part of such half having been occupied at all before the

year 1857, with the exception of about five acres which the owner of lot 31 had, by mistake, in or about 1837, cleared, believing it to be part of 31, and which, upon a new survey made in 1860, he gave up to the then claimant of the west-half of lot 32 as part of the latter lot. As to this piece so taken possession of, if that possession could be relied upon by the defendants to add to their own possession, there is no evidence that the plaintiff had any notice of it. With respect to the east-half, the earliest entry and possession relied upon by the defendants took place in 1843, at which time the grantee of the Crown was dead. It was necessary, therefore, to bring home to the plaintiff notice of such possession so as to make the Statute of Limitations begin to run against him. There is some evidence of his having had, about twenty-five years ago, knowledge of the fact of some part of the east-half being in the possession of some persons. We should have thought it necessary to have referred to another jury the question whether the plaintiff had, and if he had, when first, notice of any, and if any, what part of the east-half being in the possession of strangers, if we had not arrived at the conclusion that the plaintiff's father had an estate by curtesy which did not determine sooner than the spring of 1852, and that therefore the Statute of Limitations had not begun to run against the plaintiff before that time. The result is, that the plaintiff is entitled to recover all the premises defended for. However harsh this judgment may appear to be in its operation upon the defendants, who have, within nine years back, purchased the lands, and made considerable improvements upon them, it is to be observed that a very little care, in fact the most] ordinary precaution of investigating the title by a professional gentleman before purchasing, would have shewn the purchasers that the title never had passed out of the grantee of the Crown, and that the title offered for sale was a most unsatisfactory one.

Rule discharged.

MEMORANDA.

During this Term the following gentlemen were called to the Bar :—

HECTOR MANSFIELD HOWELL, WILLIAM FREDERICK BLEECKER, DUNCAN JOHN MCINTYRE, HENRY H. SMITH, DANIEL MCCRANEY, ALLAN CASSELS, JONATHAN BROWN DIXON, HENRY A. WARD, JOHN WILLIAMSON JONES, JAMES HENRY BURRITT, THOMAS MAITLAND GROVER, HARRY H. HILL, JOHN A. W. HATTÓN.

IN THE COURT OF ERROR AND APPEAL.

FORSYTH. V. GALT ET AL. (a)

Will—Construction—Executory devise—OR, when to be read AND.

By his will, dated 28th January, 1840, testator devised as follows: "I will and devise to my son C. all and singular, &c. (certain land), to be by him peaceably possessed and enjoyed for and during his natural life, and after his decease I will and devise the same to the heirs of the said C., and to their heirs and assigns for ever; in consideration whereof I will, order, and direct, that the said C. shall pay yearly and every year unto his mother the sum of £25 during her widowhood; and also, that he shall pay to his sister M. the sum of £25 yearly and every year, so long as she shall remain single." Then followed a devise to his son I. B. of certain lands in similar words; and then, after certain devises and bequests to others of his children, including a gift of £500 to his son R., there was this further provision, "And in the event of either of my sons, C., I. B., or R., or either of my daughters, S. or M., dying before they come of age, or without issue, then and in such case the legacies herein devised and bequeathed to them shall be equally divided amongst the surviving ones, share and share alike."

Held—1. (MORRISON and WILSON, JJ., dissenting) that extrinsic evidence of the ages of testator's children was admissible for the purpose of aiding in the construction of the will.

2. (MORRISON and WILSON, JJ., dissenting,) That C. having been over twenty-one years of age at the date of the will, and having died without issue, the gift over took effect as respected the land devised to him.
3. Per DRAPER, C. J., and GWYNNE, J.: The gift to C. was an estate in fee simple, subject to an executory devise over in the event of his dying without issue. Per WILSON, J., and MORRISON, J.: C. took a fee simple absolute. Per STRONG, V. C.: C. took an estate tail, with remainder over in the event of his dying without issue.

APPEAL from a judgment of the Court of Common Pleas, reported in 21 C. P. 408.

The grounds of appeal were, 1. That the appellants were entitled to judgment on the Special Case; 2. That the appellants were entitled to the lands in question under

(a) Argued 29th June, 1871, before DRAPER, C.J., App., MORRISON, J., WILSON, J., MOWAT, V.C., GWYNNE, J., STRONG, V.C.

Nelson Forsyth, the eldest brother and heir-at-law of Collingwood Forsyth, the devisee thereof of William Forsyth.

Leith, for the appellants. The word "or" should be construed "and" in regard to the devise over, and consequently, as the two events did not happen on which alone the devise over was to take effect, the respondents, who claim thereunder, must fail. If the devise to Collingwood gave a fee tail and not a fee simple, there would be more difficulty in reading "or" as "and:" per Hagarty, C. J., *Forsyth v. Galt*, 21 C. P. 415, 416; *Mortimer v. Hartley*, 6 Ex. 62, per Parke, B. Here, however, a fee simple is conferred; and this is shewn by the rule in *Shelley's Case*; by the charges in favor of Rodney; *Lloyd v. Jackson*, L. R. 1 Q. B. 571; *Forsyth v. Galt*, supra, 417, per Hagarty, C. J.; by the executory devise over being to the survivors of a class (*Ex parte Hooper*, 1 Drew, 264; 2 *Jarman*, 487; *Forsyth v. Galt*, per Gwynne, J., 420); by the fact being (as contended) that the words "dying without issue," in the devise over, do not import an indefinite failure of issue conferring an estate tail (*Forsyth v. Galt*, per Gwynne, J., 426), but relate to issue living at the death of the devisee (*Ex parte*, Drew, supra; 2 *Jarman* on Wills, 500; *Glover v. Moncklow*, 3 Bing. 13; *Doe v. Johnson*, 8 Ex. 81). For the same reasons, a fee simple being clearly given, under the rule in *Shelley's Case*, at the outset, it should not, by the subsequent expression of "dying without issue," be cut down to an estate tail. Moreover, in Canada there should be more reluctance to cut down a fee simple to a fee tail than in England, since there the heir-at-law and the heir-in-tail, by the law of primogeniture, are generally one and the same person, whereas, in this case, the result of reducing a fee simple to a fee tail is to disinherit all issue except the eldest child. Again, if the words "dying without issue" refer to issue living on the death of the devisee (as it is submitted they do), or even if they refer to death without issue taking place within the lives of the executory devisees (see *Forsyth v. Galt*, 420, per Gwynne, J.), then, unless "or" be read "and," so that the fee given to

the devisee, Collingwood, would not be liable to be defeated by his dying without leaving issue on his death, the value of the interest given to Collingwood would be so small that the intention of the testator to benefit him would be defeated. He could neither mortgage nor sell it, as his grantee could only hold on the previous condition of his title being defeated by the death of Collingwood without leaving issue. On this consideration alone a fee simple was held to pass in *Fairfield v. Morgan*, 2 N. R. 38. Then, in regard to the gift to Rodney, "or" must certainly be read "and," and therefore it must receive the same construction as to Collingwood. In respect of so much of the judgment of the Court below as is based on the grounds that, as regards Rodney, the dying without issue relates to a period other than of his death, and that there could be no gift over of personalty after an absolute interest vested in possession, there are authorities that here the gift over was good as to the bequest to Rodney: *Smith's Executory Interests*; *Fearne*, Vol. I., p. 404; 2 *Freeman*, 137; *Hughes v. Sayer*, 1 P. W. 534; *Turner v. Frampton*, 2 Coll. 331; *Nichols v. Skinner*, Finch, Prec. 3rd ed., 528. As regards Rodney, too, the period of failure of issue is that of his death: *Smith's Executory Interests*; *Fearne* 476, 477, and cases already cited.

S. M. Jarvis, contra.

DRAPER, C. J. OF APPEAL.—Ejectment. The plaintiff claimed under a devise contained in the will of one William Forsyth, who died seised in fee of the land in question, in the year 1841. William Forsyth had been twice married, and there was issue of both marriages living at the date of his will: among them were his sons Nelson, Collingwood, Isaac Brock, and Rodney, and his daughters Sophronia and Melissa, all being children by the second wife.

By his last will, dated 28th January, 1840, the said William Forsyth, after a gift of personalty to his wife, devised to Collingwood the land in question, "the same to be by him peaceably possessed and enjoyed for and during his natural life, and after his decease" the testator

devised it "to the heirs of the said Collingwood, their heirs and assigns for ever," charging Collingwood, in consideration thereof, with the payment to testator's wife of £25 per annum, and also with a similar payment to his daughter Melissa.

In like manner the testator devised another lot of land to Isaac. He gave to Rodney £500, to be paid, with accruing interest, as soon as he should attain the age of twenty-one years; and in the event of his sons, Collingwood, Isaac, or Rodney, or of his daughters, Sophronia or Melissa, "dying before they came of lawful age, *or* without lawful issue, then the legacies herein devised and bequeathed shall be equally divided among the surviving ones, share and share alike." He also charged the maintenance of Rodney on the proceeds of the lands devised to Collingwood and Isaac.

Collingwood died without issue, and intestate, in October, 1849, being then 37 years old. Isaac died in August, 1850, aged 31: the plaintiff is his eldest son and heir-at-law. Sophronia died in September, 1855, aged 41, leaving one son, born in 1841. Melissa died in September, 1851, leaving one son, born in May, 1850. Rodney died in June, 1842, aged 13.

The question, as submitted to the Court of Common Pleas, was whether, upon the death of Collingwood, the executory devise over took effect in favor of Isaac, Sophronia, and Melissa, or whether Collingwood had an estate in fee on his attaining the age of 21 years, which, on his death intestate, descended upon his eldest brother (by the second marriage), Nelson, under whom the defendants claim. If the Court decide that the devise over took effect then, a verdict to be entered for the plaintiff for an undivided third of the premises; if the devise over did not take effect, then the verdict to be entered for the defendant.

It was not until after this case had been argued that the Court obtained the information, subsequently embodied in the special case, as to the ages of Collingwood and the other devisees over, and of the times of their respective

deaths, and of the births of the children of Isaac, Sophronia, and Melissa. After this information the Court held that Collingwood took an estate in fee; that the word "*or*" in the devise over could not be read "*and*," and they awarded the postea to the plaintiff.

Against this decision the defendants appeal.

The case presents the question, what estate did Collingwood take, and if he took a fee what is the effect upon the devise to him of the subsequent words "in the event of my said son dying before he comes of age, or without lawful issue, then," &c.?

The devise to Collingwood, taking the ordinary sense of the words used, and gathering the testator's intention therefrom exclusively, was of an estate for life only, and after his death to his children in fee. The word "heirs" was probably used instead of children, as Collingwood was not then (nor indeed ever) married, and might not (as it has happened) have any children; but there is no room for doubt that the legal construction of the testator's language is to give Collingwood a fee simple, just as if he had only devised to him, his heirs and assigns forever.

We come, then, to the real question—upon which there is no lack of authority generally, establishing distinctions according to the precise expressions used—holding, on the one hand, that they create an estate tail; on the other, that a fee simple passes. There is, however, a singularity in this case which I have not found in any reported decision.

I think, no one on reading this will, and founding his conclusions of fact on its contents, would have supposed that only two of the children of the testator, named in the latter clause as possible devisees over, were, at the date of the will, under age, nor that Collingwood was at that time upwards of 27 years old. Whatever cause may be suggested for this oversight or forgetfulness, this fact of the age of three of his children could not have been present to his mind; or, his attention being occupied with the disposition of his property in the event of either of

them dying without issue, he did not notice the terms, "dying before they became of lawful age." It is useless, however, to speculate on the possible cause of the mistake, as, from extraneous evidence, it certainly is. Looking at the will only, and endeavouring to ascertain the testator's meaning therefrom, I am by no means sure that we might not properly construe this clause as if all the five named children were under age, because the testator framed the clause in a way which assumes that fact as forming one of the elements of his disposition.

However, we are not driven to decide the case upon this ground; nor is it argued on the part of the defendants that Collingwood took an estate tail by force of the words "without lawful issue," though that was the conclusion of Burns, J., when this will was under consideration in *Doe v. Quackenbush* (10 U. C. Q. B. 148). I do not question the authorities upon which that opinion was rested; but in my opinion they are inapplicable.

The facts being, that Collingwood did not die under lawful age, but nevertheless died without lawful issue, and the intention of the testator being expressed by the word "or," and the reason given or upheld in so many cases why "or" should be read "and" (namely, that if the devisee died under age, leaving issue, that issue would take nothing, which was naturally presumed not to be intended), not being applicable, I can find no reason for making that change. The authorities for such a change are numerous, when the necessity of it is apparent. *Fairfield v. Morgan*, in Error, cited on the argument, is a leading case on the subject. There the devise over failed. I do not, however, find that this or similar decisions are founded upon the ground that the estate was too precarious. In my opinion we must construe this will in the natural sense of the words used.

In *Eastman v. Baker* (1 Taunt. 174) Sir J. Mansfield, C. J., observes: "An estate tail has never been given upon a will like this, where one of the contingencies is *the devisee himself dying under age*; in such cases the dying

without issue is not considered indefinite and general, so as to create an estate tail, but is referred to the concomitant words, dying under age."

Again, in *Parker v. Birks* (1 K. & J. 156), the now Lord Chancellor says: "In no case in which a clear estate in fee simple has been limited by the first words has that estate been reduced to an estate tail, in order to construe the words of the gift over on the death of the devisee without issue or remainder."

Other cases to the same effect were referred to by my brother Gwynne, in the Court below.

Mr. Jarman discusses the grounds upon which words importing a failure of issue are restrained to such failure at the death in regard to real estate, and states as a clear proposition that they receive this construction when the event of dying is confined to a definite age.

Here the devise over is made as to each of the five named children, Collingwood, Isaac, Rodney, Sophronia, and Melissa, contingent upon their being survivors of some one or other of them. Upon the death of Collingwood without issue, those of his brothers and sisters who survived him would, under the will, become tenants in common of the land in question. The contingency therefore was a failure of issue at his death. His death, therefore, afforded the *punctum temporis* to which the failure of issue must necessarily be applied, he having, long before the testator's death, attained his majority; and as the language of the will shews that the testator contemplated the death of Collingwood under age as a probable contingency (though the fact was otherwise), it makes it more clear that the failure of issue was intended by him to be limited to the death of Collingwood.

On the whole, though with no little hesitation, I think the appeal should be dismissed with costs.

Most of the cases I have looked at were cited in the argument of Mr. Leith in this Court, or in the argument and judgment in the Court below. I refer also to *Doe Jones v. Owens* (1 B. & Ad. 318), *Glover v. Monkton*

(3 Bing. 13), *Taylor v. Walker* (11 Jur. N. S. 723), *Bowen v. Bowen* (L. R. 5, Chan. 244), *Bryden v. Willett* (L. R. 7, Eq. 472), *Reed v. Braithwaite* (L. R. 11 Eq. 514), *Doe v. Webber* (1 B. & Al. 713), *Doe v. Frost* (3 B. & A. 546), *Jones v. Ryan* (9 Ir. Eq. 249).

WILSON, J.—The will in question, by the second and third clauses, confers an estate in fee simple absolute in Collingwood and in Isaac of the lands devised to them. The fourth clause reduces it to a fee simple conditional, by reason of the limitation over, in the event of their “dying before they came of lawful age, or without issue.” That clause is that, “in the event of either of my sons, Collingwood, Isaac, or Rodney, or either of my daughters, Sophronia or Melissa, dying before they come of lawful age, or without lawful issue, then and in such case the legacies devised and bequeathed to them, shall be equally divided amongst the surviving ones, share and share alike.”

The devises to Collingwood and Isaac, and the bequest of the £500 to Rodney, plainly come within the operation of that clause. The bequests to Sophronia and Melissa are not within it, for by the ninth clause, under which they are each to receive £250, such bequests are “to be paid to Sophronia within one year after my decease, and the portion or legacy bequeathed to Melissa to be paid to her when she shall marry, or shall have attained the age of eighteen years.” The two daughters were, therefore, to be participants in the shares of their brothers, which fell for division under the fourth clause, but their shares were not to be contributory to any division among the survivors.

The share of Rodney consisted only of the £500, and that he was to have “so soon as he shall attain to the age of twenty-one years.” He would not take it if he died under twenty-one; nor would his share vest, if the will is to be read literally as it is written, if he left issue and died under twenty-one. So, if he lived beyond twenty-one, and died without issue, the same result will follow if

the will is to be literally read, for the limitation over would take effect.

I had made some observations upon a passage in the judgment of the Court below, under the impression that the words "there can be no devise over of personalty after an absolute interest vested in possession," were intended to go beyond the particular case, and that the word *absolute* was used to distinguish those estates, even although of a limited nature, as for life, from those which, although of the like limited nature, were defeasible by reason of some contingency or condition annexed to them, and that the former were those referred to as absolute. See *Fearne's Ex. Dev.* 478.

I understand the term was not used in that sense, but as referring to the whole and perfect estate or interest which a legatee can take in a pecuniary bequest. In that sense the "absolute interest" seems too large, for it would equally apply to realty and personalty, and it would be a mere truism.

I do not, however, agree that the legacy to Rodney was made payable to him absolutely, on his arriving at the age of twenty-one, if it be meant thereby that it was absolute *only* on his reaching that age. In my opinion he would equally be entitled to it, although he died under twenty-one, if he left lawful issue: *Mytton v. Boodle* (6 Sim. 457), *Clark v. Henry* (L. R. 11 Eq. 222), 1 *Jarman* on Wills, c. 16.

It appears to me the will should not be construed differently, as to Collingwood and Isaac, who are devisees of realty merely, because Rodney's bequest of personalty is contained in the same section, from what it should be if the bequest had not been contained in it. But in my opinion there is no necessity to make any difference in the language or in the construction, by reason of the two classes of property. The whole clause harmonizes by the same construction being given to every portion of it.

The limitation over applies in terms to these three sons, and to the two daughters, Sophronia and Melissa, notwith-

standing the shares of the daughters could not be taken by the sons by survivorship. As to that, the observation of the Vice-Chancellor in *Clark v. Henry* (11 L. R. Eq. 231) has some application, for in that case the two legatees were referred to in the condition as on an equal footing in all respects, while one of them was over the stipulated age of twenty-five at the time of the making of the will. "No doubt the clause is a little too extensive. It is made to apply in terms to two, where it is intended to extend to one; but it does not in the slightest degree alter the effect."

That language has a direct bearing upon the will now under consideration, for here the clause as to dying under twenty-one is too extensive. It did not apply to Collingwood, Isaac, or Sophronia, for they were all of them over age at the date of the will. Then, why should it in any degree alter the effect?

In my opinion the will is to be read and interpreted just in the same way as if all the five named children had been under age, instead of two of them only being minors at the time.

In *Sayer's Trusts* (L. R. 6 Eq. 319), the bequest was to testator's brother for life, and after his decease to his (the brother's) wife for life, and after the decease of all the children then to the grandchildren: *Held*, that the bequest to the children included after-born children, and so the bequest to the grandchildren was void for remoteness; and that the Court could not take notice that Susannah was, at the date of the will, sixty-two years of age, and past child-bearing, and so read the will as applicable to those children who were *in esse* at the date of the will. The Court said a written instrument must be construed by what appeared on the face of it, that a lawyer looking at it can say whether it is good or void for remoteness, whereas, if parol evidence were admitted, an enquiry would be necessary in every case into the position of beneficiaries named in it.

The changing of the word *or* into *and*, it is said, may seem to form an exception to the rule that words unam-

biguous in themselves are not to be rejected or exchanged on account of their unreasonableness ; but, as this construction has obtained so long, and is confined to a particular expression, and that expression one which is often used indiscriminately with the substituted word, there does not seem to be much danger in this latitude of interpretation ; but it should, if possible, be made to rest upon some solid principle, fixing definite limits to its application.

The cases, it is conceived, in effect, though not professedly, warrant us in stating that principle to be, as before suggested, that where the dying under twenty-one is associated with the event of the devisee leaving an object who would, if the devisee retained the estate, take an interest derivatively through him, the copulative construction prevails, though it is by no means equally clear that the rule is confined to such cases : 1 *Jarman* on Wills, c. 16, 447.

Wills are construed conjunctively, if any other event is associated with the dying under age and without issue ; as, if the bequest be to A. for life, with a gift over in case of his dying during minority unmarried or without issue : *Frawlingham v. Brand* (3 Atk. 39), *Miles v. Dyer* (5 Sim. 435, 8 Sim. 330) ; or, if the gift be to A., and if he shall die in the lifetime of B., or without issue, then over : *Wright v. Kemp* (3 T. R. 470).

It may be said that the provision as to dying under age, as to those who were of full age at the date of the will, is to be disregarded, and that the will, as to them, is to be read as if such a provision were not contained in it, but that the other words, "dying without issue," are to have full effect in their case, as if it were the only condition in the will governing their rights.

Let us consider how the case would have been if, at the date of the will, some of the devisees had then had issue born, but were under twenty-one, and died under that age. Would that fact be altogether disregarded in the construction of the will, if it is to be presumed the testator knew the fact of there being issue then born, and the

other portion of it, as to dying under twenty-one, alone be given effect to? If so, the devisees dying under twenty-one would lose their estate, although they left issue to inherit it, which would be manifestly against the testator's intention; and unless the will is to be considered in that way, when there is issue born at the date of the will, and the devisee dies after under twenty-one, it is not to be construed differently when the event which has happened at the date of the will is that majority has been attained.

In either case it is the intention of the testator which is to govern, and that intention is to be ascertained from the language of the will, and from it only, as interpreted by a continuous, uniform, and long-established course of legal decisions. Other cases might be put with the same effect which would shew that the will, as a lawyer would read it, and interpret it without extraneous evidence, is the only safe guide in effectually interpreting it.

To construe the will as has been done, is to assume that all testators carefully scan their language, and accurately describe, define and provide for everything and every person precisely according to the facts and circumstances, or even according to their own knowledge of them; but it is notorious that testators do not properly express themselves in very many instances, although they have full knowledge of the persons and subjects and objects they are providing for or dealing with, and yet it must in general be assumed that testators do bear in mind all facts and events about or with which they are dealing.

This very fourth clause is an example of the kind. The testator knew that three out of the five children who composed the particular class were of full age, yet he ranked them together as if they had all been minors. He knew, too, that the shares of his daughters were not in any event to go to the others, if survivors, yet he has expressly provided that their shares should be so distributed, in the event of their dying under age, or without issue.

In *Re Philps's Will* (L. R. 7 Eq. 151), a testator directed

that stock should, after the death of his wife, be divided among his children then living, or their heirs. Two of his children were dead at the date of the will; three survived the testator and died before the wife, and two survived her. The Master of the Rolls read *or* for *and*, thus holding that the bequest extended to the heirs or representatives of deceased children. He also held it was impossible to make a distinction with reference to those who died in the lifetime of the testator. I think he intended all to take, or he would have made some distinction."

In applying that case to the present one, it is obvious that the language of the testator did not refer to those children who had died before he made his will, and that it must be presumed he remembered that two of his children were then dead, one of whom had left a child. He does not class them altogether, unless *or* be read conjunctively: he excludes, apparently, a particular class; but the will is nevertheless given effect to, no doubt in fulfilment of the testator's own mind, by the change of the conjunction, which is done almost as of course, so strongly is the rule of law favouring such an interpretation settled, and almost irrevocably settled, by all the Courts, both legal and equitable.

Upon a full consideration of this case, I am of opinion that *or* may and must be read *and*, in the passage in question, whether the three of the five children classed together were under or over age at the date of the will; and I think the same rule would apply if all the five children had then been of full age, and to the testator's knowledge.

So much of the provision as to dying under age is inoperative as to a certain number of his children; but that does not alter the construction which is to be placed upon the language he has used, which must, in this case, be interpreted by the perusal of the will, and not by extraneous evidence.

If the devise over had been in the event of the devisee dying unmarried and without issue, would the construction have been different, if, at the date of the will, the devisee

had been married, from what it would have been if he had not been married? I think not. See *Doe v. Rawding* (2 B. & A. 441), *Doe v. Cooke* (7 East. 269), *In re Sanders's Trusts* (L. R. 1 Eq. 675).

I think the appeal should be allowed, and that the question in the special case should be answered as follows: that Collingwood Forsyth took an estate in fee simple on the death of the testator, as he was then twenty-one years of age, and that the executory devise over failed thereby to take effect.

MOWAT, V. C.—I concur in the opinion that, for the purpose of aiding in the construction of the gift over, the authorities sufficiently establish that extrinsic evidence of the ages of the testator's children is admissible. On this point I shall make no further observation.

I assume, then, that at the time the testator made his will, two of his children were under age, and three of them were over 21, Collingwood being 28, Sophronia 26, and Isaac 22; and that the testator knew the ages of his children when he directed that, in the event of any of them dying before they should come of age, or without lawful issue, then and in such case the gifts which he had made to them should "be equally divided among the surviving ones, share and share alike." Now, the construction for which the appellant contends, would require us, for all the purposes of this clause, to substitute the word "and," which the testator has not used, for the word "or," which he has used; and would then require us, reading the clause with this change, to reject altogether so much of the devise as relates to Collingwood, Isaac, and Sophronia, three of the five children, and to read the devise as if it named the other two children only. I think that it is impossible to do that. I think that we must construe the clause as applicable in some sense to these three children, as well as to the remaining two. I apprehend that Mr. Jarman has correctly stated how, in certain cases, the word "or" in wills has come to be read "and," when he says (vol. i., p. 471, 3rd ed.)

that "these words are often used orally without a due regard to their respective import; and it would not be difficult to adduce instances of the inaccuracy even in written compositions of some note. It is not surprising, therefore, that this inaccuracy should have found its way into wills. Accordingly we find that the Courts have often been called upon to rectify blunders of this nature;" which they do on the intrinsic evidence which the will itself affords. But it is one thing to presume from the nature of a devise, that a testator has used the conjunctions "or" and "and" inaccurately, as is often done orally, and in written compositions of every kind; and it would be quite another thing to assume that a testator's mention of three of his five children was a blunder, and was to be rejected as wholly inoperative. I respectfully think that such a construction receives no support from the principle on which the Courts have read one conjunction for another.

I concur in the opinion that our inability to read "or" as "and," so far as the devise affects these three children, does not prevent the substitution so far as the other two children are concerned. There is abundant authority for construing the same word differently as applied to different subjects, and I think that there is amply sufficient ground for a like course in the present case.

I think that the Court below was right in holding that the plaintiff was entitled to the postea, and I am of opinion that the judgment should be affirmed.

STRONG, V. C.—I am of opinion that Collingwood Forsyth took an estate tail under his father's will, and that the gift over, in the event of his dying without lawful issue, was consequently not an executory devise, but a remainder which, upon the death of Collingwood, on the 7th of October, 1849, without having been married, or having done any act to bar those in remainder, vested the fee simple in his brother and sisters, Isaac Brock, Sophronia, and Melissa. This construction, though differing from that put upon the will by the Court below, leads to the same

result, and entitles the respondent (the plaintiff below) to my judgment on this appeal.

I am led to this conclusion by the following considerations.

I think this is not a case in which the word "or" is to be changed into "and." Had there been nothing before the Court shewing the ages of the testator's children, at the time he made this will, the argument of the learned counsel for the defendant must have prevailed, and the devise over must have been held to be an executory devise, only to take effect on the happening of the double event of death without issue and under twenty-one, and one, therefore, which, in the case of this particular devisee, never could have been effectual.

This construction would in that case have been inevitable, for, as is said in *Right v. Day* (16 East. 69), "a multitude of decisions have established that the disjunctive word 'or,' in a devise of this kind, is to be construed as the copulative 'and,' to avoid the mischief which would otherwise happen of carrying over the estate if the first devisee died under the age of twenty-one, though he had left issue, when it was the apparent intention of the devisor that both events should happen, the dying under twenty-one and without issue, before the estate should go over." *Fairfield v. Morgan* (2 B. & P. N. R. 38), which is generally referred to as the leading case, though the doctrine is as old as *Soulle v. Gerrard* (Cro. Eliz. 525), is to the same effect. It is, however, stated in this special case that, at the date of the will, Collingwood was 28 years of age, and the other devisees and legatees were aged as follows: Sophronia 26 years, Isaac Brock 22 years, and Rodney and Melissa both under 21 years. This gives rise, in the first place, to the question, is the Court, in interpreting this devise, at liberty to take these facts as to the ages of the testator's children into consideration? The authorities quoted by the learned Chief Justice in the Court below, particularly the passage from Lord St. Leonards' judgment in *Attorney General v. Drummond* (1 D. & W.

366), and the clear statement of the rule in *Jarman* on Wills (vol. i., p. 349, 2nd ed.,) and *Wigram* on Wills (p. 65 *et seq.*, 4th ed.,) shew that the Court must endeavour to place themselves in the position of the testator, and expound the will by the light of this extrinsic evidence; and although it may make no difference in principle, for, according to the statement of the law in the authorities just cited, this evidence would be admissible for any purpose, yet there is less repugnance felt in admitting it here to conserve the will in *ipsissimis verbis*, in which the testator has expressed himself, than there would be if it was introduced for the purpose of altering his language.

Construing the will, therefore, with this information as to the ages of the devisees, and imputing to the testator, what it is no very violent presumption to suppose was present to his mind, a knowledge of the ages of his own children, it is manifestly impossible to convert the word "or" into "and," inasmuch as to do so, though it would have had the effect, as regards the two younger children, of avoiding the mischief of making the estate go over on the death of either of these two latter devisees with issue under twenty-one; yet, on the other hand, in the cases of the three elder children, the consequence of such a construction would be wholly to frustrate the testator's intention that the property given to them should go over on death without issue; for on the testator's death they would at once take absolute estates in fee simple. Such a mode of reading the will would have the effect of striking the words "dying without issue" out of it altogether, as regards the three elder children.

I cannot however agree that we are to re-model the will to the extent proposed by my brother Gwynne, in the Court below. No decided case warrants the adoption of such a construction, and it seems opposed to the general principle of forensic interpretation laid down in several late cases, of which it is sufficient to refer to *Abbott v. Middleton* (7 H. L. Ca. 88), *Grey v. Pearson* (6 H. L. Ca. 61), *Roddy v. Fitzgerald* (6 H. L. Ca. 823), and *Edgeworth v. Edge-*

worth (L. R. 4 Eng. & Ir. App. p. 41), in which case Lord Westbury propounds the rule as follows: "You are to construe a will according to the intention of the testator, as it is to be collected from the language and the dispositions contained in the will, and you must construe the language according to its simple meaning, provided you are not deterred from so doing by some inconsistency or repugnancy, or some palpable absurdity that is the result of following the literal meaning." This applies here, as shewing that the will can neither be re-cast, as was suggested by my learned brother in the Court below, nor altered, as contended for by the learned counsel for the appellant. Here the alteration of a word, as proposed, with the view of avoiding an inconvenience rather than an inconsistency, would have the effect of introducing a gross repugnancy. This ought to be sufficient to shew that the language of the will, according to "its simple meaning," should be preserved. It was surely competent to the testator, if he thought fit so to do, to exclude the operation of any rule of legal interpretation which would have the effect of varying the language he had chosen to declare his intention in, and here, I think, he has sufficiently done this by reasonable implication. Using the word "or," he tells us by the context, read by the light of the extrinsic evidence, which the Court is bound to pay attention to, that he means what he says.

To apply the rule of *Fairfield v. Morgan* to such a case as this would be greatly to extend it, and I am of opinion that the cases in the House of Lords shew that this would not now be done. Mr. *Hawkins*, in his treatise on Construction, also expresses this opinion, for he says, at page 203, "The principle of *Fairfield v. Morgan* would not be extended at the present day."

The estate which Collingwood took, I determine to have been an estate tail. As I have stated, in the events which have occurred, it is immaterial to the parties before the Court whether the words "dying without lawful issue" have attributed to them the restricted meaning of dying

without issue at the death of the first devisee, or are taken to import an indefinite failure of issue. The former construction having, however, been adopted by the other members of this Court, I think it right to state my reasons for differing from that opinion.

That the gift over here applies indiscriminately to subjects of different qualities, to both personalty and realty, can clearly make no difference, for the leading case of *Forth v. Chapman* (1 Wms. 663) decided that a gift over on failure of issue, "when applied to both descriptions of property in the same sentence, may receive the one construction as regards real estate, and the other construction as regards personal estate." Then, if the gift over on the death of Collingwood without issue is to be confined to failure of issue living at his death, it must be in consequence either of the estate over being given to the survivors, "or the surviving ones," as the words actually are, or for the reason that an estate in fee having been given to the devisee by an express limitation to "his heirs and assigns," the estate so given is not to be confined to an estate tail.

I find no case which has determined that, in a devise of realty, a gift over to the survivors of a class mentioned in the will, without more, is to be taken, by the mere force of the limitation to the survivors, to mean a dying without issue living at the death of the first taker. I do not understand the case of *Greenwood v. Verdon* (1 Kay & J. 74) as so deciding. I take Vice-Chancellor Wood there to have determined that the gift over to "the '*then*' surviving legatees" pointed to those who were living at the first taker's death, and that the case proceeded on the distinction introduced by the word "*then*."

The well known case of *Hughes v. Sayer* (1 P. W. 534), which determines that in the case of personalty a gift over to survivors will be sufficient to restrain the words to a failure of issue at the death of the first taker, proceeded upon the obvious ground that in such a case the construction is adopted to prevent the failure of the gif

over for remoteness. Then, the cases of *Chadock v. Cowley* (Cro. Jac. 695), and *Roe v. Scott* (Fearne's C. R. 473, note), are direct authorities, never yet overruled, for holding that the words "dying without issue," followed, as here, by a subsequent gift to survivors, mean an indefinite failure of issue, when the subject of the gift is realty.

There is no authority for saying that the circumstance of the devise to Collingwood having been originally limited to his "heirs and assigns," by itself, makes it impossible to cut down the estate thus *primâ facie* given in fee to an estate tail. The case of *Parker v. Birks* (1 K. & J. 156), although it may contain some *dicta* favouring such a view, was decided on a very different ground; the gift over on death "without children" having been there limited expressly "*on the death*" of the first taker, it was held to be an executory devise. In many cases, however, where there has been an estate in fee expressly given in the first instance, that estate has been cut down to an estate tail by a mere limitation over on death without issue: *Doe Ellis v. Ellis* (9 East. 382), *Biss v. Smith* (2 H. & N. 105), *Roe v. Scott* (Fearne's C. R., 473), *Jones v. Ryan* (9 Ir. Eq. 249), *Jarman on Wills*, vol. i., p. 465, and vol. ii., p. 270, 2nd ed., and cases there cited.

These authorities, which could be largely added to, shew that the *dicta* in *Parker v. Birks* must either be read with reference to the particular devise there under consideration, or that the rule was there much too widely stated.

The judgment of the Court of Common Pleas should be affirmed, with costs.

MORRISON, J., agreed with Wilson, J.

GWYNNE, J., adhered to the opinion expressed by him in the Court below.

PER CURIAM (16th Jan., 1872).—*Appeal dismissed, with costs.*

HILARY TERM, 35 VICTORIA.

(February 5th to February 17th).

Present :

THE HON. JOHN HAWKINS HAGARTY, C. J.

“ JOHN WELLINGTON GWYNNE, J.

“ THOMAS GALT, J.

WALLBRIDGE V. GILMOUR.

Ejectment—Actual possession—Unoccupied land—Evidence.

In ejectment, it appeared that plaintiff's grantor had cut timber on the land, had had the lines run by a surveyor, and then conveyed, claiming as owner; that then defendant had entered, not upon any actual possession, but the lot being unoccupied, and in a wild, uncultivated state; that there had been a prior occupation by defendant, at least as actual as that of plaintiff, but no occupation by any one for any period approaching twenty years:

Held, that, on this evidence, any presumption in plaintiff's favour from any possession proved by him, was rebutted by the facts in evidence.

EJECTMENT.

The plaintiff claimed title under a conveyance to him from Robert Stewart and Alexander Robertson, Stewart having previously sold to Robertson under a power of sale contained in a mortgage from Hugh Graham and wife, who also conveyed to plaintiff.

Defendant claimed under one Watson, through whom, it was alleged, plaintiff also claimed.

At the trial, before Hagarty, C. J., at Belleville, plaintiff proved that, two or three years before action brought, one of the parties through whom he claimed, one Graham, commenced cutting timber on the lot in question, which was vacant; that he had gangs of men at work during the winter, and had his men living in a shanty on the land; that he had the lines run by a surveyor in the years 1867–68; that he afterwards sold to another, who sold to

plaintiff. It further appeared that after the timber was drawn away there was no apparent actual possession, and that some time afterwards the defendant was found to be in possession, refused to leave, and said he owned the land.

At the close of the plaintiff's case, defendant's counsel objected that plaintiff claimed title under Ellen Graham, and no possessive right was shewn in her; and that the possession shewn was not sufficient, as Graham was merely a trespasser.

The learned Chief Justice overruled the objection.

For the defence it was proved that the defendant had been in possession several years previous to plaintiff's alleged possession; had lived six months on the land at a time, dug a well on it, and had a garden, &c., &c. This was in 1860 or 1861. It also appeared that there had been a previous shanty on it, the builder being unknown; and defendant swore he had slept on the premises eight years before; that he lived about a mile from it, and had taken wood off it every winter for the last seven or eight years.

No paper title from Watson or from the Crown was shewn on either side.

The jury found for the plaintiff.

In Michaelmas Term last, *R. P. Jellett* obtained a rule *nisi* for a new trial for misdirection, in telling the jury that if they found possession in Graham the verdict should be for plaintiff; or for non-direction, in not leaving the question to the jury as to whether defendant had a prior possession; and on the law and evidence, as the evidence displaced any *primâ facie* title that might have been raised in plaintiff's favour, and that enough was not shewn by plaintiff to make out a *primâ facie* title in him against defendant.

Wallbridge, Q.C., shewed cause, citing *Eccles v. Patterson et al.*, 22 U. C. 167, 8; *Shaver v. Jamieson*, 25 U. C. 166; *Covert v. Robinson*, 24 U. C. 282; *Doe Vancot v. Read*, 3 U. C. 244.

Jellett, contra, cited *Wilkes v. Babcock*, 1 C. P. 388; *Henderson v. Morrison*, 18 C. P. 221.

HAGARTY, C. J., delivered the judgment of the Court.

It has always been the practice, and doubtless is the law, that a plaintiff, either in ejectment or trespass, can maintain the action against any person entering upon his actual possession without further proof of title; and such person, unless he shew title, must be treated as a mere wrongdoer.

Commencing with *Allen v. Rivingston*, 2 Wm. Saund. 111, down to *Asher v. Whitlock*, L. R. 1 Q. B. 1, the position is supported by countless authorities. "I take it," says Cockburn, C. J., in the latter case, "as clearly established that possession is good against all the world, except the person who can shew a good title, and it would be mischievous to change this established doctrine. In *Doe v. Dyeball* (M. & M. 346) one year's possession by the plaintiff was held good against a person who came and turned him out, and there are other authorities to the same effect." If therefore, in the present case, plaintiff could have shewn an actual possession on which defendant entered and ousted him, I think his case would be clear.

I think there was sufficient on the evidence given at the trial to leave the case to the jury, and that a nonsuit should not have been granted. Proof of possession of land does not alone, in ejectment, suffice to maintain the action.

In *Doe v. Barnard* (13 Q. B. 953) Sir J. Patteson, giving the judgment of the Court, where the plaintiff had been actually ousted, says: "The cases would have warranted us in saying that the lessee of plaintiff had established her case, if she had shewn nothing but her own possession for thirteen years. The ground however of so saying would not be that possession alone is sufficient in ejectment (as it is in trespass) to maintain the action, but that such possession is *prima facie* evidence of title, and no other interest appearing in proof, evidence of seisin in fee." And Lord Denman says, *Doe v. Lawley*, (3 N. & M. 333) and in notes to preceding case: "The onus of explaining the character of this possession lies upon the party against whom the presumption from possession arises."

It seems clear that a plaintiff can recover, on proof of a

twenty years' possession, against any one in possession for a lesser period.

In *Doe Harding v. Cooke* (7 Bing. 346) there was a recovery on a twenty years' possession against a subsequent ten years' possession in defendant. Tindal, C. J., says: "I cannot see why any period short of twenty years should be supposed to raise a counter presumption sufficient to outweigh the presumption arising from the first twenty years." *Doe Ausman v. Minthorne* (3 U. C. 423) is to same effect. The difficulty here is, a possession, say of a year, is shewn; then an unexplained entry of defendant, not on any actual possession, but on an unoccupied lot in a state of nature, or at all events uncultivated; then a prior occupation of defendant, at least, as actual as that of plaintiff; but no occupation by any one for any period approaching twenty years.

Brest v. Lever (7 M. & W. 593) was trespass to land. Plea: *liberum tenementum*. Defendant, to support his plea, proved acts of ownership for seventeen years before action brought. Plaintiff proved that at an earlier period and within twenty years, the property had been conveyed in fee to one *Barron*. Neither plaintiff nor defendant deduced any title from *Barron*. The Judge held that these acts of ownership by defendant made out a *prima facie* case in support of the plea, notwithstanding plaintiff's evidence, and defendant had a verdict. This verdict was set aside after argument. Parke, B., says: "By the plea of *liberum tenementum*, defendant admits plaintiff is in possession and that he himself is *prima facie* a wrongdoer, but he undertakes to shew a title in himself which shall do away with the presumption arising from plaintiffs' possession. This he was bound to do, either by shewing title by deed in the usual way, or by proving a possessory title for twenty years. But here the defendant has only proved acts of ownership extending over seventeen years, and has not connected them with any prior title; it amounts therefore to nothing more than a longer against a shorter possession—a mere priority of possession, and for

a period insufficient to confer any title except against a mere wrong-doer." The language here cited would be strongly against plaintiff's contention in the present case. The short actual possession shewn by plaintiff would be sufficient against ouster by a mere wrong-doer, because for that purpose it was *primâ facie* evidence of title. But when the person afterward found in possession, who had entered as on a vacant possession, proves himself to have been in possession at earlier dates, it seems to us that it destroys any presumption of title or seisin in the plaintiff.

We presume that a person in actual possession, exercising acts of ownership, is the owner. We know nothing of the origin or nature of his title, and we protect his possession against the actual entry or ouster of any person not prepared to shew a better title. But when the former is shewn to have entered on vacant land, and after a short possession ceases to actually occupy, and then, without any actual ouster or disseisin, a person enters and proves that prior to plaintiff's entry he occupied, claiming as owner, it would seem, in Baron Parke's words, "to amount to nothing more than a longer against a shorter possession, and for a period insufficient to convey any title."

In *Doe Wilkes v. Babcock* (1 C. P. 388) Macaulay, C. J., held that "where neither party shews any title beyond a short possession, the defendant in possession, if he entered peaceably, under colour of claiming right, may seemingly set up the *jus tertii*, on the ground that plaintiff must recover on the strength of his own title. Sullivan, J., says, "The utmost length to which the doctrine of prior possession, being *primâ facie* proof of title in ejectment, has been carried, is stated in *Williams* (note 2, Saund. 111), where he admits it (as it appears to me doubtingly) to be confirmed by modern authorities to the extent that actual possession, not apparently tortious, will furnish a *primâ facie* case against a wrong-doer." That was a case in which defendant had been in possession several years, having entered claiming by right, not tortiously. Plaintiff had been in possession for several years previously. Thus, it may be

said that proof of the land being still Crown property destroyed all presumption in plaintiff's favour arising from his prior possession.

How a presumption of seisin may be rebutted is shewn by the already cited case of *Doe v. Barnard*. A man was in possession eighteen years and died, and his widow continued thirteen years' longer in possession. Patteson, J., says: "She shewed that her husband left several children * * if the husband's possession raised a presumption that he was seised in fee, that fee must have descended on his child, and of course the lessor of the plaintiff (the widow) must fail." And again: "This does not establish the point that the bare fact of two persons having been in possession, the one prior to the other, will give the former a presumptive title, and far less that such title, if presumed, cannot be displaced by proof of actual title in a third party under whom neither plaintiff nor defendant traces title."

When a defendant is shewn to be in possession not having entered under plaintiff, or in any way having ousted or dispossessed plaintiff, it would seem clear that the presumption is all in favor of his right; and the plaintiff must prove a prevailing right to the possession: *Cole* on Ejectment 287, and cases there cited; *Adams* on Eject. 279. We also refer to 25 U. C. 156; *Taylor* Ev. (1864) 136.

On the whole, we are of opinion that as against defendant's actual possession, not shewn to have been under or in privity with plaintiff, or as an actual entry upon or ouster of him, plaintiff has not on the evidence shewn a sufficient right to recover.

We think there should be a new trial without costs.

Rule absolute for new trial, without costs.

HAMBLY V. FULLER.

9 Geo. 2 ch. 36.—*Deed to trustees—Enrollment in Chancery unnecessary—Construction.*

Held, following the series of authorities from *Doe Anderson v. Todd*, 2 U. C. 82, down to *Davidson v. Boomer*, 15 Grant 1, 218, that 9 Geo. 2 ch. 36 is in force in this Province, but that enrollment in Chancery is not necessary to validate a deed in other respects executed in compliance with that Act.

In a deed conveying land to trustees for a specified purpose there was provision made for a new appointment in the case of a trustee ceasing to belong to a certain religious persuasion: *Held*, that upon the happening of that event, in the case of the last surviving trustee, the estate did not *ipso facto* become divested, but the intention of the grantor plainly being that it should go over to new trustees, this could only be effected by the surviving grantee conveying to them.

TRESPASS *quare clausum fregit*, describing the close by metes and bounds. Pleas—1, not guilty; 2, that the close was not plaintiff's, as alleged; and 3, setting out the piece in which, &c., by metes and bounds, and averring that, at the time of the alleged trespass, the same was the freehold of one William Ketcheson; and that the defendant, as the servant of Ketcheson, and by his command, committed the said alleged trespass.

Issue, and also new assignment for trespasses committed by defendant in excess of the alleged rights, and also on other parts of the said land, and on other occasions and for other purposes than those referred to in said third plea.

At the trial, before Hagarty, C. J., without a jury, at Belleville, it was admitted that the title was originally in one John Canniff, who, by a deed dated 8th of August, 1821, conveyed one acre, describing it by metes and bounds, as part of lot No. 8 in the fifth concession of Thurlow, to William Ketcheson and six others, as trustees for a site for a dwelling house for a minister of the Methodist Church, and who, by a deed dated 9th of August, 1841, conveyed nineteen acres to one Burden, part of the same lot No. 8, describing them by metes and bounds, and excepting [from] the operation of that deed the acre

conveyed by the deed of 8th of August, 1821. Plaintiff claimed under the deed of 9th of August, 1841; and the main contention at the trial was as to the site of the acre described in the deed of August, 1821, the defendant contending that it was where certain manure was placed, which was the act of trespass complained of; and the plaintiff, that it was in a different place. If the plaintiff's contention on that point was right, then he was entitled to recover. Upon the part of the plaintiff, it was further contended—1, that the deed of 8th of August, 1821, was void; 2, that William Ketcheson, the last survivor of the grantees named in that deed, having ceased to be a member of the Methodist Episcopal Church, the whole reverted to the heirs of Canniff; and that, although the piece of land was not covered by the deed under which the plaintiff claimed, yet that he was in possession, and that therefore the act of defendant was the act of a wrong-doer, and so plaintiff was entitled to recover.

The learned Chief Justice was of opinion, upon the evidence, that the piece of land upon which the alleged trespass was committed was covered by the description in the deed of 8th of August, 1821, and so found. The verdict was accordingly entered for defendant, leave being reserved to plaintiff to have the verdict entered for him, with one shilling damages, upon the points of law raised, if the Court should be of opinion that it should be so entered.

In Michaelmas Term last, a rule *nisi* was accordingly moved by Harrison, Q. C., to which Wallbridge, Q. C., shewed cause, citing *Humphreys v. Hunter*, 20 C. P. 456; C. S. U. C. ch. 69, sec. 7.

Harrison, contra.

GWYNNE, J., delivered the judgment of the Court.

Until a Court of Appeal shall otherwise decide, we must, upon the authority of *Doe Anderson v. Todd* (2 U. C. 82), *Hallock v. Wilson* (7 C. P. 28), *Mercer v.*

Hewston (9 C. P. 349), *Anderson v. Dougall* (13 Grant 164), *Anderson v. Kilborne* (13 Grant 219), and *Davidson v. Boomer* (15 Grant 1, 218), hold that 9 Geo. II. ch. 36 is in force in this Province; but we must also hold that enrollment in Chancery is not necessary to give validity in this Province to a deed in other respects executed so as to comply with the provisions of that statute, either for the reason given by this Court in *Hallock v. Wilson*, or that given in *Mercer v. Hewston*.

The deed, in virtue of which the defendant contends that the verdict rendered for him by the learned Chief Justice of this Court should be upheld, was executed by John Canniff on the 8th day of August, 1821, and was made between the said John Canniff, of the one part, and William Ketcheson and six others, described as trustees upon the trusts (thereinafter mentioned,) of whom William Ketcheson alone survives, of the other part, and it was thereby witnessed that, for and in consideration of the love, goodwill, and affection which the said John Canniff had for the Methodist Episcopal Church, and also in consideration of the sum of five shillings of lawful money of Upper Canada paid by the said trustees, the receipt whereof is thereby acknowledged, he, the said John Canniff, hath given, granted, and released unto them, the said trustees, and their successors in trust and office, for the uses and purposes thereinafter declared, all the right, title, interest, &c., &c., of the said John Canniff in a certain piece of ground, being part of lot No. 8 in the third concession of the township of Thurlow, describing it by metes and bounds precisely as set out in the third plea; to have and to hold unto them, the said trustees and their successors, trustees in trust and office, for ever, upon trust that they may erect and build, or cause to be erected and built thereon a dwelling house for the use and benefit of the itinerant ministers and preachers of the said Methodist Episcopal Church, according to the rules and discipline which from time to time may be agreed upon and adopted by the ministers and preachers of the said Methodist

Episcopal Church assembled at their general conference, and upon further trust and confidence that they shall at all times for ever permit such ministers and preachers as shall be duly authorized by the general conference of the ministers and preachers of the said Methodist Episcopal Church, or by the yearly conference authorized by the general conference, to enter into and occupy the said premises during the time such minister or preacher shall be stationed on the circuit or station to which said premises belong; and in further trust and confidence that, as often as any of the said trustees, one or more of them, shall die *or cease to be a member or members of the said Episcopal Church*, then and in that case it shall and may be lawful and the duty of the stationed minister or preacher authorized as aforesaid to call a meeting of the remaining trustees as soon as shall be convenient; and when so met, the said minister or preacher shall proceed to nominate one or more persons to fill the place of him or them whose office or offices has or have been vacated as aforesaid, provided the person or persons so nominated shall have been one year a member or members of the said Church immediately preceding such nomination, and at least twenty-one years of age; and the said trustees so assembled shall proceed to elect and, by a majority of votes, appoint the person or persons so nominated, to fill such vacancy or vacancies, in order to keep up seven trustees for ever; and the said John Canniff did thereby warrant and defend all and singular the premises mentioned in the deed, with the appurtenances, absolutely freed and discharged from all incumbrances whatsoever, unto them, the said trustees and their successors, for ever.

This deed purports to have been executed in the presence of two subscribing witnesses, and it was registered in the Registry office of the county of Hastings, in which county the land mentioned in the deed was situate, on the 14th of August, 1821.

It appears that the grantor, John Canniff, lived for

many years after the execution of this deed, for, by the deed under which the plaintiff claims, made and executed on the 9th day of August, 1841, between the said John Canniff, of the one part, and one Abraham Dennis Burden, of the other part, the piece of land described in the deed of the 8th of August, 1821, is specially excepted from and out of the operation of the description of the land granted by the deed of the 9th of August, 1841, by Canniff to Burden.

Enrolment in Chancery being unnecessary to the validity of the deed of 8th of August, 1821, and the other conditions required by the Act 9 Geo. II. ch. 36 being complied with, that deed, at least from and after the expiration of twelve months, became and was effectual to transfer the land therein described to the grantees therein named for some estate, which estate (the grantees named not being a body corporate and the words heirs and assigns not being added) was, as I take it, an estate to the grantees named, and the survivors or survivor of them, as joint tenants for life. It is said that Ketcheson, the sole survivor of the original grantees, has ceased to be a member of the Episcopal Methodist Church, and it was contended that, under the provision in the deed authorizing a trustee to be appointed in the place of a trustee ceasing to be a member, upon Ketcheson, the last survivor of the original grantees, ceasing to be a member of the Church, he became divested *ipso facto* of all estate in the land; but the intention of the grantor plainly was, that the estate should go over to the new trustees, of whom it was intended that there should always be seven, and, upon new trustees being appointed, they would not, although appointed as trustees, have the legal estate until it should be conveyed to them by those in whom by the deed it was vested. This could only be effected by deed executed by the original grantees, or the survivors or survivor of them. I am of opinion, therefore, that the legal estate which John Canniff originally granted by the deed of the 8th of August, 1821, and which legal estate

he recognized as being in existence when he executed the deed of 9th of August, 1841, is now vested in William Ketcheson, as the sole surviving original grantee, although he may have incapacitated himself from further acting in the trust under the provisions of the trust deed.

As to the matter of fact found by the learned Chief Justice, namely, that the *locus in quo* is within the description of the deed of August, 1821, we should not interfere with that finding unless it was very clear that it was erroneous; but we see no reason to find fault with the finding upon this point; on the contrary, we concur in thinking that the weight of the evidence supports that finding; and upon the only other point raised, namely, the validity of the deed, we are of opinion that, until the legal estate shall be conveyed by Ketcheson to other trustees, as contemplated by the deed, it must remain in him during his life; and as there is no pretence of its having been conveyed out of him, the defendant is, we think, entitled to retain his verdict.

A point was suggested at *Nisi Prius*, which was not argued before us, namely, that the defendant had failed to establish that he had acted under the authority of Ketcheson, and so had failed to prove his plea; but there does not seem to be anything in the point, for there was sufficient to establish that the defendant acted under the direct authority of Reed, and there was sufficient from which a jury might infer that *he* was the agent of Ketcheson, and, as such, had general authority from him to authorize the act, or that it was ratified by him: there was no evidence from which it could have been inferred that the defendant was acting upon his own authority, or without any, or otherwise than under the protection of such title as Ketcheson had. See *Ewer v. Jones*, 9 Q. B. 622.

Rule discharged.

SHIER V. SHIER.

Lease—Covenant—Pleading—Mutual mistake—Equitable pleading.

To a declaration on a covenant in a lease, alleging that defendant covenanted with plaintiff that he would during the term spend and employ, in a husband-like manner, upon the demised premises, all the straw which should grow thereon, and charging, as a *breach*, that defendant drew away many waggon loads of straw which grew thereon, and used it elsewhere, defendant pleaded that the covenant in the declaration was not the whole of the covenant, but that it contained additional matter completely qualifying, as he contended, and in effect neutralizing that part of the covenant set out; the whole alleged covenant was then set out, with an averment that defendant had fulfilled it according to the true intent and meaning of the added part:

Held, on demurrer, plea bad.

Defendant also pleaded, in substance, on equitable grounds, that by mutual mistake the covenant declared on was inserted in the lease in different terms from what both parties had agreed upon, intended and supposed when the lease was executed, and that reading the covenant as it should have been, there was no breach thereof:

Held, GWYNNE, J., dissenting, plea bad.

ACTION upon a covenant in a farm lease, the declaration alleging that defendant covenanted with plaintiff that he would during the term, which was for five years from the 1st of January, 1868, spend and employ, in a husband-like manner, upon the demised premises, all the straw which should grow and be raised thereon: *breach*, that defendant drew away many waggon loads of straw which grew upon the demised premises, and used and consumed the same elsewhere. There were also two other breaches of the covenant charged, which also extended to not cutting standing timber, except for rails, buildings, or firewood, and to not allowing any timber to be removed from the premises: *breaches*, that defendant cut standing timber, and allowed it to be carried away.

3rd plea, as to so much of said first count of the declaration as related to the straw, that the material portions of the said alleged deed embracing the said covenant were in the words following, that is to say: "And," meaning thereby and the defendant, "will spend, use, and employ in a husband-like manner upon the said premises," meaning thereby the lands and premises demised, as in the first

count alleged, "all the straw and dung which shall grow, raise, renew, or be made thereupon, and the lessee," meaning thereby defendant, "agrees to put the manure made on his," meaning thereby defendant's, "farm, and that of the lessor," meaning thereby plaintiff, "every second year for said term": *averment*, that he did make all the straw and dung which grew, was raised, renewed, or made upon said demised premises and his own farm, every second year, into manure, and spent, used, and employed the same in a husband-like manner upon the said demised premises, and not elsewhere.

5th plea, on equitable grounds, as to so much of the first count as related to the straw, that at and before the execution of said lease, defendant was seised of and living upon the west half of the lot of land in said first count mentioned, and the intention and agreement, both of plaintiff and of defendant, was that defendant should use the whole lot as one farm, and that he should be at liberty to remove the straw from said demised premises to the west half of said lot, but not from off the whole lot, provided that he would spend, use, and employ, in a husband-like manner, all the manure made on the whole one hundred acres, every second year, upon said demised premises, and that defendant should be at liberty to spend, use, and employ said manure, made on the whole one hundred acres, every intervening year, on the west half of said lot: *averment*, that instructions were given, both by plaintiff and defendant, to one Beavers, who drew said lease, therein acting as agent of both said parties, to insert therein a covenant to the effect aforesaid, and no other or further covenant in respect to said straw or manure, and that he, intending to carry out said instructions, wrote in said lease the words following, "And the lessee agrees to put the manure made on his farm, and that of the lessor, every second year," which words still formed part of said lease, intending thereby to limit and qualify said covenant, according to the instructions aforesaid: *averment*, that defendant never removed any of the straw grown on any

part of said whole lot therefrom, but made the same into manure thereupon, and always spent, used, and employed, in a husband-like manner, all the manure so made on the whole lot, every second year, upon said demised premises; and defendant averred that he used, spent, and employed, on the west half, the manure so made on the whole lot, each intervening year, which was the alleged breach in the said first count; and the defendant submitted that if said clause above set out did not qualify and limit the covenant sued on, according to the agreement and intention of the parties to this cause, that then defendant, having carried out the true agreement of the parties, in the full belief that under the facts and circumstances above detailed he was entitled so to do, was entitled to set up such performance on equitable grounds, in bar of that portion of the first count of the declaration.

6th plea, on equitable grounds, as to so much of the first count of the declaration as alleged the covenant that the defendant would not, during said term, cut any standing timber upon said lands, except, &c., that at and before the execution of the lease in said first count mentioned, defendant was seised of and residing on the west half of the lot, and it was intended by the parties that defendant should work the whole lot as one farm: *averment*, that at the time aforesaid there was a dwelling house upon the west half, in which defendant resided, and a dwelling house upon the said demised premises, in which plaintiff resided, and there were no other dwelling houses upon the whole lot; and plaintiff then reserved and excepted by said lease said dwelling house on the east half, for his own use and occupation, so that defendant had no residence in and upon said east half, wherein he could use or burn any firewood; and it was intended and agreed, at and before the execution of said lease, that defendant should have the right to cut down standing timber on said demised premises, to use and burn at and in his own dwelling house upon the west half, and they both so instructed one Beavers, who drew the said lease, therein acting as agent

of both parties, but by mistake he omitted so to qualify and word the covenant in said lease, but worded it as in the declaration mentioned, whereby it did not express the true intention and agreement aforesaid; and defendant, relying upon said agreement and intention, and believing that he had the right thereby intended to be conferred, cut standing timber upon the said demised premises for firewood, which he used and burned at his dwelling house on the west half, and save and except timber so cut and used for the purpose aforesaid, defendant cut no standing timber on the said demised premises.

DEMURRERS: That even if said third plea were true in fact, and the covenant were as therein alleged, the allegation of performance of such covenant by defendant, in said third plea alleged, was insufficient in this, that a performance of the covenant, according to the legal effect of the words of the covenant in the said third plea mentioned, was not in the said third plea stated.

That said fifth plea, even if true in fact, endeavoured to set up as a defence a mutual mistake in the execution of the covenant therein referred to, and to allege a performance by defendant of said covenant, as if it were reformed, without seeking a reformation of the said covenant; and that even if such a reformation were sought by said plea, the same and the performance of it, as reformed, could not be adjudged and determined on by a court of law.

That said sixth plea professed to set up an oral agreement, precedent to the written and sealed agreement between the parties, as an answer to the claim of plaintiff, in respect of the matters thereby pleaded to, without stating that at the time of entering into the written agreement, being the covenant in said first count mentioned, it was not intended that the writing should embrace the whole of the agreement of the parties, and without stating that the writing did not in fact state the whole of such agreement, and that it was not stated that the alleged oral agreement was independent of but collateral to the written one.

Ferguson, for the demurrers, cited *O'Leaga v. Perez*, 11 Ex. 506; *Solvency Mutual Guardian Society v. Freeman*, 7 H. & N. 17; *Lindley v. Lacey*, 17 C. B. N. S. 578.

R. Smith, contra, cited *Luce v. Izod*, 1 H. & N. 245; *Steele v. Haddock*, 10 Ex. 643; *Lawrence v. Walmsley*, 12 C. B. N. S. 799; *Drain v. Harvey*, 17 C. B. 257.

GWYNNE, J.—The third plea in substance is, that the covenant in the declaration is not the whole of the covenant, but that it contained additional matter which, as the defendant contends, completely qualifies and in effect neutralises that part of the covenant as set out in the declaration, and he sets out what he says was the whole covenant, and he says that he has fulfilled it according to the true intent and meaning of the added part. The plea then in substance is, that the covenant as set out in the declaration is not defendant's deed, and I do not think, where the law provides a simple form of plea for raising a particular issue, that embarrassing pleas of this nature should be countenanced. In *Wood v. Dwarris*, (11 Ex. at p. 505), Martin, B., with reference to a special rejoinder to an equitable replication, says: "According to Mr. Bovill's argument it is good, because it in substance amounts to a denial of the replication; but, where the law has prescribed a direct mode of traverse, if a party, instead of adopting that short and simple form, encumbers the record with a long unintelligible and repugnant statement, I am by no means prepared to say that such a pleading is not bad on general demurrer; for it tends to impede the course of justice, and casts additional trouble on those concerned in the administration of it."

The defendant's contention here is, that the covenant, as stated in the declaration, is qualified by the added words, and that, in fact, so qualified, defendant's covenant was to make the straw which grew on the demised premises every year into manure, and to put that manure, together with the straw made into manure on his own farm, upon the demised premises and his own farm in each alternate

year. Without inquiring whether the whole covenant, consisting of two parts, united by the copulative "and" the lessee agrees, &c., is or is not capable of a different construction from that suggested by the defendant, and one which would give some effect to both parts of the covenant—as, for example, that the defendant will *make* into manure, and use upon the demised premises, all the straw grown thereupon, and, as to *laying* the manure, that he will put it on the ground of the demised premises every second year, together with the manure made every second year upon defendant's own farm—I do not think we can so utterly expunge from the covenant, as the defendant asks us, the very express words forming the first part of it as set out in the declaration. No authority has been cited to justify us in so doing. Judgment must, therefore, be for the plaintiff on the demurrer to the third plea.

The 5th and 6th pleas are pleaded upon equitable grounds, the former to one and the latter to the other of the two breaches of the covenant set out in the declaration, the equitable grounds alleged being the same in both pleas, namely, that by mutual mistake the covenant declared on was inserted in the lease in terms different from what both parties had agreed upon and intended and supposed when the lease was executed, and that, reading the covenant as, it is said, it should have been, and but for the mistake would have been, inserted, the defendant had committed no breach, but, on the contrary, had in all respects fully performed and executed the covenant. The two pleas taken together constitute the ground for equitable relief relied upon, and might have been pleaded, and I think may now be read, as having been pleaded as one plea.

Speaking for myself, it is, I think, much to be regretted that the Courts of Law have, as I think they have, taken too limited a view of what the intention of the Legislature was in allowing equitable defences to be pleaded to actions at common law. If, however, the rules which have been established exclude these pleas from the consideration

of a Court of Law, we must abide by the decisions, however hard in the particular case the application of the rules may appear to be. In a recent case, *Allen v. Walker* (L. Rep. 5 Ex. 188), there appears to be exhibited an inclination upon the part of the Court to relax one of the rules, or rather, the rule, as it is expressed in several cases, namely, that it is only in cases where a perpetual injunction would be granted that an equitable defence can be sustained. Martin, B., in giving the judgment of the Court, says: "It has certainly been frequently so said, and generally speaking it is a true test; but the statute (C. L. Procedure Act), which gives the defence *upon equitable grounds*, says nothing of perpetual injunction: the test given by it is, that the Court of Equity would give relief against the judgment *upon equitable grounds*." And with reference to the particular case before the Court, he says: "It appears to us that, if a husband obtained a judgment in an action for an assault, the assault being the removal of him from a house, the separate property of his wife, into which he had intruded himself against her will, a Court of Equity would interfere to prevent him from obtaining the fruits of the judgment. If they did not, we think they would fail effectually to protect a wife's separate property." The rule, which is involved in this judgment, appears to be that, where it would be inequitable that a plaintiff should be permitted to obtain the fruits of his judgment at law, there a defence upon equitable grounds is admissible under the statute.

What the statute says is, "that any defendant, in any cause, who, if judgment were obtained, would be entitled to relief against such judgment on equitable grounds, may plead the facts which entitle him to relief by way of defence, *and the said Courts shall receive such defence*." In *Mines Royal Societies v. Magney* (10 Ex. 489), the plea which was proposed to be pleaded was not allowed, because, before the defendant should be entitled to any equitable relief against the action, it would be necessary that he should execute to the plaintiff a surrender of a lease. A

Court of Equity would not have restrained the plaintiff from obtaining the fruit of his judgment, if a judgment had been obtained, *except upon the condition* of the defendant executing a surrender of the lease.

In *Woodhouse v. Farebrother* (5 E. & Bl. 277, A.D. 1855), a plea upon equitable grounds was held bad, because the defendant was not in equity entitled to relief, except *upon condition* of his paying, as security, whatever might be found to be due by the principal in respect of the contract of suretyship; but there are expressions in the judgment in that case which appear to me to go far to support the plea upon equitable grounds in this case. Lord Campbell, C. J., giving judgment with reference to the plea in that case, says, "The defendant does not impeach the deed sued upon as fraudulent, *or shew that a judgment obtained in this action would not be honest.*" And again, "If upon such a plea we were to give judgment in bar of the action, all legal remedy would be gone, *although the defendant confesses his liability to pay the sums which the action seeks to recover.*" And again, "We think that it was intended to admit a plea upon equitable grounds only where final justice may be done by the Court of Law in the pending suit." And the rule governing the case is laid down in these words, "In short, we think that a plea on equitable grounds is to prevail only where, followed by a common law judgment, it will do complete and final justice between the parties."

The rule, then, to be gathered from this case is that, if the grounds for equitable relief pleaded shew that a judgment obtained in the action would not be honest, and if the common law judgment, that the plaintiff take nothing by his writ, would do complete justice between the parties in respect of the subject matter of the suit, the plea will be allowed as a good defence in bar of the action.

In *Luce v. Izod* (1 H. & N. 245, A.D. 1856), to an action on a covenant that the defendant would not practice as a surgeon in the parish of Stanfield, alleging as a breach that he did so practice, the defendant asked leave to plead

a plea, alleging that a part of Stanfield was in Stanfield Mortimer, and that the defendant had paid the plaintiff for the privilege of exclusive practice in that part of Stanfield which was in Stanfield Mortimer; that it was not intended that the covenant should restrain him from practising in that part of Stanfield, but that the covenant was so framed by mistake, and that the breaches of the covenant complained of were only committed in that part of Stanfield, *and therefore that the covenant ought to be reformed*. The plea was allowed, striking out so much as alleged that the covenant ought to be reformed. Now, in that case, the defendant had committed no breach of the covenant, as it was admitted it should have been framed: in that respect it is identical with the case before us. In that case, if at some future time the defendant should commit a breach of the covenant as it was intended it should have been framed, the plaintiff would have to bring another action; yet it was not deemed necessary for that reason that the covenant should be reformed *as a condition* of the defendant being relieved from an unjust action, charging as a breach what was intended and agreed should not be a breach of the really intended covenant.

If such second action should be brought, it would be sufficient for the plaintiff to allege such an act as would be a breach of the covenant framed, as it was agreed and intended that it should have been framed, and to such a breach the defendant could offer no defence; so that, for any practical purpose, no reformation of the covenant was necessary. So likewise, in the present case, if at any future time the defendant should commit a breach of the covenant, as it was intended and agreed that this covenant should have been framed, the plaintiff might declare upon the covenant as it now stands, alleging the breach, committed by the defendant, of the covenant as it should have been framed, (for such breach would also be a breach of the covenant as at present framed,) and so, inasmuch as upon the covenant, as it stands, the plaintiff could recover for a breach committed by the defendant of the covenant

framed, as it is admitted it should have been, reformation of the covenant is not necessary for any practical purpose; and so there can be *no equity in imposing* upon the defendant the reformation of the instrument, as *a condition* of his being relieved from a judgment obtained in the present action in respect of what is admitted is no breach of the real covenant agreed upon between the parties, and which should have been inserted in the lease, which judgment obtained under such circumstances would not be an honest judgment, and the plaintiff, therefore, should not in equity be permitted to obtain the fruits of it.

In *Wake v. Harrop* (6 H. & N. 768, E. T. 1861), it is said that the Courts will not allow, as an equitable defence, any matter which does not put an end to the right of the plaintiff to sue the defendant. Thus, if the plea sets up a contract on which the defendant would be in some way liable, it is insufficient; and upon this principle in T. T. of the same year, the Court of Exchequer, in *Solvency Mutual Guarantee Co. v. Freeman* (7 H. & N. 17), disallowed a plea because the equitable grounds relied upon entitled the defendant only to have the contract reformed, leaving him still subject to an existing liability to the reformed contract, so that a common law judgment, that the plaintiff take nothing by his writ, would not have done complete justice between the parties in the given case.

In *Wake v. Harrop*, in Appeal, (1 H. & C. 202), Crompton, J., says, in reference to that case, "It is in equity a fraud to sue the defendants when it was agreed that they should not be personally bound." So here it is in equity a fraud in the plaintiff to take advantage of the admitted mistake in the frame of the covenant, and to endeavour to recover damages at law from the defendant in respect of matter which is no breach at all, but, on the contrary, a literal fulfilment of the covenant as it had been agreed upon, and as it was intended to be and should have been, but for the mistake, framed. As said again by Crompton, J., in *Wake v. Harrop*, "Under these circumstances it is inequitable to sue the defendant;" and if, as in that case, it was held

to be inequitable that the plaintiff should sue persons who it was never intended should be liable, so it is inequitable in this case to take advantage of an admitted mistake to make that to be a breach of covenant, entitling the plaintiff to damages, which is in fact and truth a faithful fulfilment of the real covenant as it had been agreed upon between the parties. In *Gee v. Smart* (8 El. & Bl. 319), the test as to whether the matter constitutes a good defence upon equitable grounds is thus stated: "If our common law judgment on the plea, for the defendant, will not do final justice between the parties, but the plea is in the nature of a bill in equity, calling upon the Court for that sort of conditional and manifold award which is in the nature of a decree, and not a judgment at law, we cannot entertain it, because we have no authority to pronounce, or machinery to enforce, such an award." In *Wakley v. Froggart* (2 H. & C. 669), Pollock, C. B., says: "One of the earliest restrictions imposed by the Courts of Law was that, unless the effect of the plea was to furnish a complete answer to *the action* and terminate the litigation, it should not be entertained." In that case the plea was held bad, because a judgment for the defendant would not finally settle *the whole matter in dispute* between the parties.

Now, in the case before us, the whole matter in dispute and the whole object of the litigation consists, as is admitted by the demurrer, in a dishonest, unconscientious attempt of the plaintiff to take advantage of a mistake in the frame of the covenant, and to recover damages at law from the defendant, as for a breach of his covenant, in respect of conduct which, so far from being a breach, is an actual and precise fulfilment of the covenant as agreed upon, and as it should have been framed. The defendant insists that it would be inequitable, under the circumstances, to permit the plaintiff to enjoy the fruits of a judgment at law, and in my judgment the common law judgment that the plaintiff shall, under these admitted circumstances, take nothing by his writ, will as effectually

and finally settle the whole matter in dispute and terminate the litigation as a plea found for the defendant denying the alleged breaches would do. It affords no answer to say that hereafter the defendant may commit a breach of the covenant as agreed upon. Until a breach of that covenant shall be committed, the plaintiff has no equitable claim whatever to enforce against the defendant; and when such a cause of action arises, if it ever shall arise, the defendant will have no defence to offer, by reason of any thing determined in this suit, and the plaintiff will be able to recover, in respect of such a breach, in an action at law upon the covenant as it stands, without any reformation of the covenant. All that judgment for the defendant in any action for breach of covenant can conclude is in respect of the breaches committed before action brought. A common law judgment, that the plaintiff take nothing by his writ, will finally and effectually settle all matters in dispute in respect of which this action is brought, and such a judgment is, in my opinion, the only judgment which, under the circumstances, would be just and equitable. All that is necessary to do complete justice between the parties, is to restrain the plaintiff from alleging, as a breach of the contract contained in the lease, any matter which would not also be a breach of the covenant, if framed as it is admitted this covenant should have been framed, and for this purpose no reformation whatever of the covenant is necessary. Until the defendant shall commit a breach of the real covenant, it is inequitable for the plaintiff to sue the defendant at law, and he ought not to be permitted so to do; and if the defendant shall commit a breach of the real covenant as agreed upon, he will have no defence to an action at law on the covenant as it stands any more than he could now offer a defence, upon equitable grounds or otherwise, to the present action, if it was brought for such a breach. The jurisdiction which the Court of Equity exercises in such cases is stated in Lord Redesdale's Treatise, p. 151, thus: "The Court will *either* rectify the deed, according to the intention of the parties,

or will restrain the use of it in the points in which it has been framed contrary to it, or in which it has gone beyond their intention in their original contract." This passage is cited as the law and practice of the Court at the present day, in Mr. *Daniell's* work, 4th ed. vol. 2, p. 1471 ; and the ground of the jurisdiction is, that the plaintiff, in using the legal jurisdiction to obtain thereby the benefit of a mistake, is acting contrary to equity and good conscience. The latter of these alternatives appears to me to be all that is necessary in this case.

That the Court of Chancery has the power, I doubt not, to reform the instrument so admitted to have been framed, as it is, by mistake, by way of *ancillary* relief, to restraining the enforcement of the judgment ; but the Court is more powerless than I can conceive it to be, if it has not jurisdiction to restrain the enforcement of a judgment admitted to be unjust, otherwise than *conditional* upon the performance of an act which the Court has power to order to be done, and for the doing which for any practical purpose no actual necessity appears to exist. I think therefore that the 5th and 6th pleas do afford a good defence, upon equitable grounds, consistently with the rule as established by the decided cases, and that we defeat the intention of the Legislature if, in the presence of the admitted facts, we hold these pleas to be bad.

HAGARTY, C. J.—I think it perfectly clear that, if the term had expired, and the present claim covered all possible disputes between the parties, the fifth plea is a good bar. I think it equally clear that we have no power to reform the instrument. If therefore our judgment here cannot do final and complete justice between the parties in the subject matter of this covenant, I think the plea must be bad, and the only remedy a bill to reform.

In days when pleading was less loose, this plea would most probably have been held bad, as uncertain in the issue tendered ; as it seems to be alternative either that the words referred to qualify the covenant, or if they do

not, then the equitable bar is suggested. But I pass to the graver objections.

If we hold this plea a good bar, then, if a breach occur hereafter as to the straw, is the lessor to declare on this contract as it is now, or as it ought to be? If the tenant break it as to the whole lot, then, if landlord declare on the contract as it ought to be, the plea of *non est factum* would, I think, disprove the declaration. If he declare in its present shape, defendant must again set up the equitable bar.

I do not think such a state of things can be allowed, or that we can hold this defence good, on the assumption that no future difficulty will arise. I cannot distinguish this case, in principle, from one in which a suit is brought on covenant for £50 rent, reserved on a demise, with many years yet unexpired. An equitable plea is pleaded, that by mistake £50 was put in the lease, as the rent, instead of £30. I see no remedy, in such a case, except a bill to reform. I have examined all the cases I can find, and the principles seem very clear.

In *Brown v. Osborne* (11 C. P. 500) the previous cases are reviewed: *Fowler v. Perrin*, (25 U. C. 227); *Monsell v. Mitchell* (23 U. C., 116); *McGinness v. Kennedy*, (29 U. C., 93).

Lord Campbell says, in *Woodhouse v. Farebrother* (5 El. & Bl. 289), "We could not attempt to do justice between the parties without pronouncing, instead of a common law judgment, an equitable decree. * * We cannot enter into equities and cross equities. We should often be without means to determine what are the fit conditions in which relief should be given."

Wakley v. Froggart (2 H. & C. 669) is also in point. In *Borrowman v. Rossell* (16 C. B. N. S. 68) it seemed conceded that, if there were any necessity to reform the contract, there could not be a defence at law. Pollock, C. B., says: "It is said that an equitable defence cannot be set up while the contract is executory. But I am of opinion that the equitable defence may be allowed when,

as here, the contract is at an end, or is broken, so that it does not need reforming, and the matter may be finally disposed of here." Williams, J.: "If the Court of Equity were to reform this contract according to the terms of this plea, it would be useless, because it is plain that the performance of the agreement has become impossible by reason of the default of plaintiff. The Court of Equity could not therefore impose terms."

The older case of *Perez v. Oleaga*, (11 Ex. 506), is strongly to the same effect; also *Solvency Company v. Freeman*, (7 H. & N. 17). See also *Vorley v. Barrett*, (1 C. B. N. S. 225); *Clerk v. Laurie*, (1 H. & N. 320); *Flight v. Gray*, (3 C. B. N. S.)

It has been urged that wherever the plea would finally dispose of the action, the Court of law should give effect to the equity. The proper test, I think, is whether, if judgment recovered at law, equity would unconditionally relieve against it.

In the case of a contract still executory, where other breaches may occur on a contract alleged in the plea to be erroneously set out, and according to the actual bargain bearing a more or less different construction, I am strongly of opinion that on a bill filed for relief against the judgment, the Equity Court would order the contract to be reformed as a condition of relief.

I understand my brother Gwynne to hold the case of *Luce v. Izod* (1 H. & N. 245), to favour an opposite view. It was in 1856, and if it bear the construction now contended for, it certainly seems to me wholly opposed to a number of subsequent cases. It was a short case, on motion to be allowed to plead an equitable plea. The defendant had covenanted he would not practice as a surgeon in the parish of Swallowfield or Shinfield. Breach, that he did so practice. The plea set out that, as to a part of Shinfield, it was not intended to restrain him from practising in such part, but this covenant was so framed by mistake, and that therefore the covenant ought to be reformed. The remarks of the Court are very brief; no

case cited, and no discussion on principles. Martin, B., says: "The plea affords sufficient ground for a perpetual injunction. The defendant is entitled to say that, as between him and plaintiff part of Shinfield was considered as within Stratfield Mortimer." And Pollock, C. B., merely directs "the rule to be absolute that defendant be at liberty to plead the plea, striking out so much as alleges that the covenant ought to be reformed." No Court is bound by this decision, as it was merely on motion, unless agreeing with its view of the law.

Lord Campbell says, in *Woodhouse v. Farebrother*, speaking of a prior decision on an equitable plea, "As the case was decided merely on motion, without the opportunity of carrying it to a Court of Error, we should not have considered ourselves bound by, it had we disapproved of it, but we entirely concur in the reasoning on which it is founded." But this case is very different from that before us, and possibly may be supported on the ground that plaintiff should be enjoined against suing for defendant's practising in that part of Shinfield intended to be excepted; and if a breach of the true contract occurred, there would not be the same difficulty as here in declaring or pleading. If a like course were to be followed here, plaintiff would be enjoined from suing, except for breach of the covenant as it ought to be. It is opposed to every idea I entertain as to the manner of dealing with such a difficulty, leaving the plaintiff with an imperfect instrument confessedly representing a different contract from the true one. Such a mode of disposing of such a case would legally apply to a lease for a number of years to run, with admitted errors in every covenant. How is a lessor to deal with such an instrument? Is he to be driven to file the bill to reform? If a breach in the true bargain occur, I do not think he can bring an action, stating it, as it ought to be, quite differently from the instrument of title.

In *Druiff v. Lord Parker*, (L. R. 5 Eq. 138) Lord Hatherley (then Wood, V.C.) says: "No single instance has been produced in which a plaintiff, bringing forward a document

on which he founds his right, has been allowed to say that the instrument which he himself produces to the Court does not express the real agreement into which he has entered." This disposes of the idea that the lessor, in any subsequent action, could declare on this covenant in any other shape than as it appears in the lease. It is no objection that we are not to anticipate any future action or dispute. Lord Hatherley's language, in the case just cited, shews this. The plaintiff there had a bill of exchange given to her by her debtor, in which her own name had been, by mistake, inserted above that of the drawer, and this was pleaded as a defence at law. There is much discussion as to how (if in any way) plaintiff might have replied at law. The bill was filed for a rectification of the mistake, and to restrain defendant from setting up this defence at law, or issuing any execution on any judgment to be obtained at law. Lord Hatherley remarks on *Wake v. Harrop*, and there says: "The plaintiff has a bill, with her own name inserted by mistake above that of the drawer. She claims a right not to be embarrassed by this mistake. * * * She wants to have the instrument rectified in that respect. She claims to have an instrument which shall be free from all doubt and embarrassment;" and he overruled the demurrer for want of equity, and held her so entitled, even if no action had been brought.

I cannot distinguish the case from one in which the lease provides for a named rent each year, and the plea states it to be a mistake, and the rent was to be only payable every second year. I cannot conceive any Court of law or equity pronouncing a judgment giving effect to such a defence, and leaving the parties for five, ten, or twenty years with the instrument unreformed. I think the plea is bad.

The same remarks are applicable to the sixth plea, as to the wood. I think it also bad in the same view of the law.

GALT, J., agreed with HAGARTY, C. J.

Judgment for plaintiff on demurrer.

STOREY v. VEACH AND WIFE.

ANDERSON AND WIFE v. WALKER.

THACKERAY AND WIFE v. ASKIN ET AL.

Action by and against husband and wife—Evidence merely conjectural—Right to address jury—Incompetency of husband and wife under Evidence Act of 1869 (33 Vic. ch. 13, O).

In an action by husband and wife for negligence of defendants, surgeons, in treatment of wife, the evidence was of a very weak and unsatisfactory character, amounting in fact to pure conjecture whether there had been any negligence or not; while the evidence offered on behalf of defendants was of the most favorable character to them:

Held, that, on plaintiff's counsel declining to take a nonsuit, the Judge was right in directing the jury to find for defendants, as also in refusing him the right to address the jury on the whole case.

Held, also, where husband and wife are parties to the record, their evidence, since 33 Vic., ch. 13 (O.), is inadmissible either for or against each other.

THE case of Storey v. Veach and Wife was an action tried before Galt, J., at the last Fall Assizes at Toronto, for assault committed by the wife of defendant on the plaintiff. At the trial counsel for defendant proposed to call the wife as a witness, which was objected to, but the learned Judge admitted the evidence, though with great doubt, and the jury returned a verdict for defendants.

In the following term, *McKenzie*, Q.C., obtained a rule for a new trial, without costs, on the ground of the improper reception of this evidence, and that the husband and wife were incompetent witnesses for one another, or to give evidence at all on behalf of defendants, and were, in fact, incompetent altogether under 33 Vic., ch. 13 (O).

McMichael shewed cause. "The exception in the Ontario Act (33 Vic., ch. 13), does not exclude the wife from giving evidence for herself: it merely incapacitates her from giving it for her husband. There have not been many decisions in England, but there is a case of *Stokehill and Wife v. Pettingill*, in a note to *Stapleton v. Croft*, 21 L. J. Q. B. 249, in which it was held that a wife was a competent witness for her husband where she and her husband sued for an injury to her. In *Stapleton v. Croft* it was contended that the effect of the Statute was to render her

a competent witness when not a party, but the Court held otherwise, Erle, J., dissenting. The object of the Act is to enable all parties on the record to give evidence for themselves, and, that being so, the Act should not be rigidly construed, and the exception as to the wife should be considered as applying only where she is not a party to the record. See also *Barbat v. Allen*, 7 Ex. 609; *Taylor, Ev.*, p. 1169.

McKenzie, Q.C., contra, referred to a case in Chancery, against husband and wife, relating to the separate estate of the wife, in which it was held that the wife was admissible, and also to *Gracey v. Gracey*, an alimony suit, in the same Court (not reported), in which she was rejected (a). He also referred to *Percival v. Caney*, cited in *Barbat v. Allen*, and *Buller's N. P.* 286a.

In the case of *Anderson and Wife v. Walker*, the action was for injury done to the wife, who was admitted as a witness, and a verdict was rendered for the plaintiffs.

In the following Michaelmas Term, a rule for a new trial was obtained, on the ground of the reception of her evidence, to which *C. S. Patterson* shewed cause, and which *Anderson* supported.

The same authorities were cited.

Thackeray and Wife v. Askin et al. was an action charging the defendants with negligence, as surgeons, in the treatment of the wife, whereby she was injured and lost the use of her leg.

The second count was for the husband's injury, *per quod consortium amisit*.

Pleas, separately, not guilty and denial of retainer.

At the trial at Chatham, before GWYNNE, J., it appeared that the wife had met with an accident and severely injured her leg. It was asserted that the leg was broken, and that

(a) In *Devlin v. Devlin*, an alimony suit, at the present Toronto Chancery Sittings, (March, 1872), before SPRAGGE, C., the wife tendered herself as a witness, and was rejected.—REPORTER.

defendants said it was not broken. Very violent inflammation set in, and erysipelas appeared. The plaintiffs' witnesses seemed to consider, from examination made some months' after the injury, that the leg was actually broken, but none of them could point to any specific act of neglect or malpractice on defendants' part, and the evidence altogether was of the weakest and most unsatisfactory character. The wife was tendered as a witness, and was rejected. The husband also tendered himself, and the learned Judge offered to admit him if the first count were abandoned, and the wife's name removed as a co-plaintiff. This was declined. At the close of plaintiff's case a nonsuit was moved for. Leave was reserved, and the case proceeded.

The evidence for the defence was overwhelmingly convincing that either no fracture had ever existed, or that if it had, it had been so skilfully reduced as to leave no trace. The medical evidence also proved that on the plaintiffs' case no unskilful treatment was shewn. Defendants' counsel again pressed for a nonsuit, and the learned Judge ruled that if plaintiffs would not accept one, he could only direct the jury, on such evidence, to find for defendants, as no other finding would be proper. Counsel for plaintiffs urged his right to address the jury on the whole evidence. This was not allowed, and defendants had a verdict.

In Michaelmas term, *Becher*, Q. C., obtained a rule for a new trial, for the rejection of evidence, and refusal to allow him to address the jury, and for misdirection in telling the jury that on the evidence there was no case and that the jury should find for defendants.

Robinson, Q. C., shewed cause, citing, on the question of the rejection of evidence, *Barbat v. Allen*, 7 Ex. 609; *Harrison v. Almond*, 4 Dowl. 321; *Chitty Pleading*, 7th ed. 82-3; and as to the misdirection, *Wright v. Skinner*, 17 C. P. 334; *Avery v. Bowden*, 6 E. & B. 953; *Deverill v. Grand Trunk Railway Co.*, 25 U. C. 517.

GALT, J.—It is unnecessary to enter on a review of the history of the law relating to the competency of witnesses: the whole subject has been fully discussed in Mr. *Taylor's* Treatise, 3rd ed., chapter "Competency of Witnesses." It is sufficient to say that, in England, a Statute was passed in 1851, 14 & 15 Vic., ch. 99, the 2nd section of which is as follows: "On the trial of any issue joined, or of any matter or question, or of any inquiry arising in any suit, action, or other proceeding in any Court of Justice, or by any person having by law or by consent of parties authority to hear, receive, or examine evidence, the parties thereto, and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall, *except* as hereinafter excepted, be competent and compellable to give evidence either *vivâ voce* or by deposition, according to the practice of the Court, on behalf of either or any of the parties to the said suit, action, or other proceeding." The exception had reference to criminal proceedings, and actions for breach of promise of marriage, and actions or proceedings in cases of adultery, and need not be considered in the discussion of the question now before us. Under the provisions of this Act, the following curious anomaly occurred: it was decided that when husband and wife were parties to the record, both could be examined: *Stokehill and Wife v. Pettengill*, 21 L. J. Q. B. 249, note; but that where the wife was not a party she could not be examined: *Stapleton v. Croft*, 18 Q. B. 367; *Barbat v. Allen*, 7 Ex. 609. Mr. Taylor then states, at sec. 1219: "On one point the Act of 1851 (of which Mr. Taylor was the author) was essentially defective; for, although it rendered husbands and wives admissible witnesses for or against each other when both were jointly parties as plaintiffs or defendants, it did not further interfere with the common law rule which precluded either husband or wife from giving testimony in a cause in which the other was a party, &c., &c. The Evidence Amendment Act of 1853, 16 & 17 Vic., was passed with universal consent, and the admissibility of the testimony of married

persons has at length been placed upon a sound footing. As a general rule, all husbands and wives of parties to the record, excepting the husbands and wives of defendants in criminal proceedings, and the wives of supposed paramours who are respondents in suits for dissolution of marriage, or for damages by reason of adultery, are now competent and compellable to testify; but they are still privileged from disclosing any communication made to them during the marriage." The words of the Act are the same as those above quoted from 14 & 15 Vic., except that after the words "examine evidence" the words "the husbands and wives of the parties thereto" are inserted. This is now the law of England.

By ch. 32, Consol. Stat. U. C., sec. 3, "No person offered as a witness shall, by reason of incapacity from crime or interest, be excluded from giving testimony." Sec. 4 provides that "Every person so offered shall be permitted and be compellable to give evidence, notwithstanding that such person has or may have an interest in the matter in question," &c., &c. Sec. 5 is the most important in connection with the present discussion: "This Act shall not render competent, or authorize or permit any party to any suit or proceeding individually named on the record, or any claimant or tenant of premises sought to be recovered in ejectment, or the landlord, or any other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate or individual behalf any action may be brought or defended either wholly or in part, or the husband or wife of any such party, to be called as a witness on behalf of such party, but such party may, in any civil proceeding, be called and examined as a witness in any suit or action, at the instance of the opposite party: provided always, that the wife of the party to any suit or proceeding named in the record shall not be liable to be examined as a witness by or at the instance of the opposite party."

This Statute remained in force until the passing of the Act of Ontario, "The Evidence Act of 1869," and under it

no person named as a party to the record, nor on whose behalf a suit was brought or defended, could be examined on his own behalf, although he might be called as a witness by the opposite party, and in no case could the wife be called. The Evidence Act of 1869 was passed to amend this state of the law. Sec. 4 is, with the exception I am about to mention, in effect the same as sec. 2 of 14 & 15 Vic., before it was amended by 16 & 17 Vic., which I have already considered. Sec. 5, in sub-secs. *a*, *b*, *c*, *d*, *e*, contains the exceptions to sec. 4. Sub-sec. *a*, on which the case now before us turns, is, "Nothing herein contained shall render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband." When we remember that until this Act was passed, parties to the record could not be examined on their own behalf, although they might be called by the opposite party, and that their wives could not in any case be called, and when we refer to the decisions of the Courts in England on the Act of 1851, of which sec. 4 (saving the exception) is a copy, we can, in my opinion, come to no other conclusion than that our Legislature has deemed it expedient to adopt an entirely different course from that pursued in England, and that the effect of the exception is, in all cases where husband and wife are parties to the record, to render them both incompetent witnesses for any purpose, and that not only cannot they, or either of them, be called on their own behalf, but they cannot, nor can either of them, be called by the opposite party.

By ch. 32, Consol. Stat. U. C., above quoted, it is plain that the wife could not be called either on behalf of her husband or by the opposite party, although the husband might be called by the opposite party. This section has been expressly repealed, and, in place thereof, the Legislature has said that nothing in the Evidence Act of 1869 shall render any husband competent or compellable to give evidence for or against his wife, nor any wife competent or compellable to give evidence for or against her husband.

In all cases the suit is the suit of the husband, although the wife may be the meritorious cause of action, or it may be brought for injuries done to her, and, consequently, she may be a necessary party; but the suit is his, and if the wife is called as a witness, it must necessarily be for or against him. On the other hand, if the action is against husband and wife for any matter done by her, the defence is his; and if the wife is called, it must be as a witness for or against him. In the same way, if the wife is a necessary party to the suit, and the husband is called, it must be as a witness for or against her, and in all these cases the Legislature has expressly said that husband and wife shall not be competent witnesses. It may not have been the intention of the Legislature to prevent the opposite party from calling the husband of a female plaintiff or defendant as a witness, nor of depriving the husband of the right to tender himself as a witness, but I can arrive at no other conclusion than that they have done so, and if the law is found to be inexpedient, it rests with the supreme authority to amend it.

GWYNNE, J.—The statute 16th Vic. ch. 19, consolidated in 22nd Vic. ch. 32, which removed all exclusion from giving evidence by reason of incapacity from crime or interest, enacted that nothing therein contained should render competent any party to the record or any person on whose immediate or individual behalf the action was brought, or the husbands or wives of such persons respectively, to be called as a witness on behalf of such party; but such party might be called in any civil proceeding at the instance of the opposite party, except that the wife of the party to any suit should not be liable to be examined as a witness by or on behalf of the opposite party.

Now, where husband and wife are joined in any suit at law, whether as plaintiffs or defendants, the female plaintiff or defendant was as much within the above exception, as if her husband alone was the party named on the record, and accordingly in *VanNorman et ux v. Hamilton*,

(25 U. C. 149), the Court of Queen's Bench held that a wife, co-plaintiff with her husband, could not be called as a witness at the instance of the defendant.

Now the Ontario statute, 33 Vic. ch. 13, while rendering parties to the record competent to give evidence on their own behalf, as before they were compellable to give evidence at the instance of the opposite party, preserves the exclusion of wives to the fullest extent, and, in cases where they are parties to a record at law, provides for the exclusion of the husband also; for that, as it appears to me, is the plain operation of the language used. In an action at law a wife can only be a party to the record jointly with her husband, whether it be as plaintiff or defendant, and the action or defence, although both are joined, and although they can be joined only in right of the wife, is nevertheless the action or defence of the husband: he is, *dominus litis*. Reading then the statute as relating to "parties" to the record, for it is in respect of "parties" to the record that the questions here arise, the clause of the Act will read thus: "On the trial of any issue raised in any civil suit, &c., &c., &c., the parties thereto shall be *competent*, on behalf of themselves, or of either or any of them, and *compellable*, at the instance of the opposite party, to give evidence, except that nothing herein contained shall render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband." Now, this exception being enacted in respect to *parties* to the suit, when applied to husband and wife, when they are parties, what other effect can it have than to declare that in such case neither the one nor the other is competent or compellable to give evidence? Parties to the suit are competent and compellable, except husband and wife parties; and where a husband, under the C. L. P. Act, adds a count for damages, *per quod consortium amisit*, by reason of a tort suffered by the wife, to a count for damages for the injury sustained by the wife from the same tort, he cannot, under colour of

being called to give evidence upon the count for damages, *per quod consortium amisit*, prove the cause of action, declared upon in the other count, for the tort itself; for, as he cannot recover on his own count unless the tort to the wife be established, if he was permitted to prove this tort, he would be giving evidence for his wife which the statute declares he cannot do. It is frivolous to say that he may give evidence *on his* own count and have a verdict on it, and that his evidence shall not apply to the other count, for, assuming there to be no evidence of the tort, except that given by him, there would then be error on the record, namely, a verdict for the defendant on the first count, declaring that no tort had been committed by the defendant whereby the wife suffered injury, and a verdict against the defendant on the second count, awarding damages to the husband for the loss sustained by him by reason of the tort, in the first count mentioned, inflicted by the defendant upon the wife. We were told that there have been three cases recently in Chancery, wherein the wife, being plaintiff, was admitted to give evidence upon her own behalf. That may, perhaps, be admissible in Chancery, within the language of the statute, although it cannot be done at Common Law, because the position of a wife, plaintiff in Chancery is very different from that of a wife plaintiff at law. She sues in Chancery by her next friend, and is regarded in the light of a *feme sole*. Her husband is placed upon the record as a defendant, and for the most part nominally as such, the relief being generally sought against some other real defendant. Upon such a record a wife plaintiff may, in the language of the statute, be competent to give evidence *for herself*, without giving any evidence *against* her husband; but in common law the only place which husband and wife can occupy on the record, is as joint plaintiffs or defendants, and in such case the language of the statute excludes them from giving evidence for or against *themselves*, or *either* of them, an expression seemingly specially appropriate to the position of joint interest which they occupy on the record,

HAGARTY, C. J.—The questions seem to depend wholly on our Local Evidence Act, 33 Vic. ch. 13. Sec. 4 enacts that on the trial of any issue, &c., “the parties thereto, &c., shall, except as hereinafter excepted, be competent and compellable to give evidence, &c., on behalf of themselves or of either or any of the parties, &c.” Sec. 5: “Nothing herein contained shall render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband.” Sub-sec. 2, declares that the Act shall not apply to proceedings for adultery or breach of promise of marriage. Sub-sec. 3: “Nothing herein contained shall render any husband compellable to disclose any communication made to him by his wife during coverture,” and *vice versa* as to the wife.

It can only be under this sec. 4 that any party to the record can be a competent witness, and such competency is expressly declared to be subject to the exception immediately following, that (in substance) husband and wife remain as before, incompetent to give evidence for or against each other.

A wife cannot sue alone, her husband must join either for mere conformity, or, as in the cases before us, where he claims damages for injuries peculiar to himself, besides those sustained by the wife.

In either case I cannot understand how the action must not equally be considered the husband's action, nor do I see how plain words can be held not to apply, because the damages sought are nominally apportioned between the husband and wife.

It was conceded in argument that, whenever a husband sued or is sued alone, the wife is incompetent; but it was urged that where she is the meritorious cause of action, as in *Anderson and Wife v. Walker*, it is *her* action, and she should be heard in assertion of her own right, or in her own defence. But I cannot see how it is not in such a case her husband's action also. If he be defendant with her for her wrong, he is responsible, in substance, as if the wrong were committed by himself.

When he sues with her, as in the last-named case, for injuries done to her, he receives the damages, except in the contingency of his dying before they were reduced into possession. He is allowed by the C. L. P. Act to join to such a claim his own demand for injuries to him in his own right. (See this question discussed in *Campbell and Wife v. Great Western Railway*, 20 C. P. 347, and in Appeal, 563).

The wife cannot give evidence for or against her husband. If called to prove the wrong by which she suffered great pain, &c., is she not emphatically giving evidence for her husband, who is her co-plaintiff, who is liable for the costs of the suit, and who puts in his own pocket the damages her evidence ensures from the jury? If in such action, on being called, she wholly denies any wrong being done, is she not giving evidence against her husband? If she be sued with him for her own wrong, and he call upon her as a witness, and she (from any motive) give a highly coloured account of what occurred, thereby inflaming the damages, is she not giving evidence against her husband, although called with an opposite design?

In making this exception the Legislature excluded the testimony, either on the ground of interest, or for the general mischief likely to arise from the possible appearance of husband and wife contradicting each other on oath. The grant of the privilege to withhold communications between husband and wife, during coverture, favors the probability of the latter view having influenced the Legislature. In that view, and perhaps almost equally in the alternative view, the exclusion of the evidence is perfectly intelligible.

I do not feel at liberty to refine away plain language, used, as I read it, to carry out an obvious intent. I am therefore of opinion that in actions where husband and wife are co-plaintiffs or defendants, their evidence is necessarily excluded for or against each other.

The Imperial Act, 14 & 15 Vic. ch. 99, passed in 1851, is fully commented on in *Barbat v. Allen*, (7 Ex. 614). The

remedial clause (2), enabling parties to the cause to be competent and compellable, is in substance the same as our own, except that it says, "in any suit, action or other proceeding," whereas our Act says, any "*civil* suit, action or proceeding;" and sec. 3 excepted parties in criminal proceedings, and declared the husband and wife not competent or compellable for or against the other in any *criminal* proceeding.

Our statute, however, contains the general clause of exclusion of husband and wife, for or against the other, without any limit as to the kind of proceeding, in which consists its essential difference from the Imperial statute. In *Barbat v. Allen* the wife of a defendant (she being a party on the record) was held not to be a competent witness. Parke, B., says, "She was incompetent by the common law * * and when we look at statute 14 & 15 Vic. ch. 99, it is clear it was never meant to render a wife a competent witness for or against her husband."

In *Stapleton v. Croft* (21 L. J., 18 Q. B., 367, Q. B. 249) on the same statute, Erle, J., admitted the wife for her husband (she not being a party). The majority of the Court declared her incompetent, concurring in the decision of *Barbat v. Allen*. In a note to *Stapleton v. Croft*, it is stated that in *Stokehill and Wife v. Pettingill*, (Q. B. June 19), where husband and wife sued for injury to her, it was held by all the Court that the wife was a competent witness to prove the plaintiff's case.

In 1853 the law was again altered (16 & 17 Vic. ch. 83), and husbands and wives specially declared competent and compellable, except in criminal proceedings and adultery.

I have already noticed the material difference between the 14 and 15 Vic. ch. 99, and our Act, and, in consequence, I think the admission of the wife, when a party to the record, under that Imperial Act, does not oppose the decision at which I have arrived.

I repeat, I cannot see any other conclusion which it is possible to adopt consistent with giving a fair interpretation and meaning to language which strikes me as reasonably plain and unequivocal.

As to the case of *Thackeray and Wife v. Askin*, we consider the practice too well settled, to admit now of any question, that when the Judge holds there is no case to go to the jury, the plaintiffs' counsel cannot be heard urging them to disregard such ruling. On the correctness of the ruling on this head, we agree with the learned Judge on a full examination of the evidence.

Deverill v. Grand Trunk (25 U. C. 517) very fully reviews the state of the authorities up to the date of its decision (1866). The plaintiff must be able to shew some specific negligence on which his right to recover rests.

In 1869 *Giblin v. McMullen* (L. R. 2 P. C. 335) was decided in the Privy Council. Lord Chelmsford says: "In every case, before the evidence is left to the jury, there is a preliminary question for the Judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." He cites *Ryder v. Wombwell* (L. R. 4 Ex. 32), which reviews many of the cases. Again he says: "It is not however correct to say that the Judge could not have nonsuited the plaintiff after the defendant had entered upon his case, as it was decided in *Davis v. Hardy* (6 B. & C. 225) that the evidence given by defendant may be used for the purposes of a nonsuit."

Smith v. Great Eastern Railway (L. R. 2 C. P. 4) is also in point. The judgment of Willes, J., fully upholds the general doctrine. As has been said, "no evidence" means "no reasonable evidence."

We think the language of Lord Tenterden, cited by Cresswell, J., in *Avery v. Bowden*, (in Error, 6 E. & B. 974), is especially applicable to the case before us: "If the evidence was such that the jury could only conjecture, but not judge, it ought not to go to the jury; that the onus was on the party offering the evidence; and that he, if he offered only evidence consistent with either supposition of fact, was not entitled to have it put to the jury."

To say the best of the plaintiff's evidence here, it was

pure conjecture whether there had been any negligence or not, and it was certainly consistent with the existence or non-existence of any default on defendants' part.

We think there was nothing for the jury except to find for defendants, if plaintiffs declined a nonsuit.

In the first two cases, rules absolute for new trial, without costs ; in the last case, rule discharged.

REGINA V. STAFFORD.

*License to sell spirituous liquors—Quashing of by-law under which issued—
Conviction for selling quashed.*

The quashing of a by-law, under which a certificate has been granted and license issued for the sale of spirituous liquors, does not nullify the license ; and a conviction for selling without license cannot, therefore, under these circumstances, be supported.

K. McKenzie, Q.C., obtained a rule to quash a conviction for selling liquor without license.

It appeared from the papers and affidavits filed that the defendant resided in the village of Almonte, and was a shop-keeper ; that on or about the 10th July, 1869, the Council of the township of Ramsay, in which township the village of Almonte is situated, passed a by-law prohibiting the sale of spirituous liquors in shops and places other than houses of public entertainment within the said municipality ; that subsequently to the passing of the said by-law the village of Almonte had been set apart as a separate municipality ; that after the separation had taken place, the corporation of the village of Almonte passed a by-law for regulating the granting of certificates for obtaining shop licenses for the sale of spirituous liquors within the said village ; that after the passing of the said by-law the defendant applied for and obtained a certificate, and subsequently a license, authorizing him to sell spirituous liquors by retail in his shop, for which he paid the necessary fees, amounting to \$75 ; that after the granting of the said license the said by-law was quashed ; that

on the 18th November, after the said by-law had been quashed, but during the time when the said license was in force, an information was laid against defendant for selling liquor without the license required by law. The defendant, in answer to such information, relied on his license as a defence, but the magistrate, treating the license as revoked by reason of the by-law, under which the certificate on which it had been issued, having been quashed, convicted the defendant, and against such conviction the defendant appealed.

Osler shewed cause, citing *Regina v. Strachan*, 20 C. P. 182; *Regina v. King*, 20 C. P. 246; *Regina v. Denton*, 18 Q. B. 761, S. C., *Dearsley*, C. C. 3; *Millbanke v. Grant*, 3 Q. B. 690; *Stevenson v. Oliver*, 8 M. & W. 234; *In re Barclay v. Municipality of Darlington*, 5 C. P. 432.

McKenzie, contra, cited *Regina v. Ross*, Rob. & Harr. Digest, 127.

The Statutes are referred to in the judgment.

GALT, J.—We are of opinion that this conviction must be quashed. The defendant is in possession of a license properly granted to him, to be in force from the 14th of April, 1871, until the 1st of March, 1872, and it appears to us that a conviction for selling liquor without a license cannot be supported. It is true that the by-law under which the certificate for the license was issued has been quashed, but there is no provision in the Statute 32 Vic., ch. 32, for cancelling any license once issued. Sec. 13 enacts that “any member of a municipal corporation, or officer or other person, who shall, contrary to the provisions of this Act, vote for, or issue, or cause or procure to be issued, a certificate for a tavern or shop license, shall, upon conviction thereof, for each offence, pay a fine,” &c., but nothing is said about making the license granted or such certificate null and void, or even revocable. It was argued before us, that because the by-law, under which the certificate had been granted, was quashed, therefore the

certificate was void and the license vacated. I can find no authority in the Statute sustaining such a view.

HAGARTY, C. J.—The license by the Statute is granted by the Lieutenant-Governor, after certain preliminary certificates, &c.

In the case before us everything was done in good faith, and the defendant was duly licensed, in the sense that, when challenged with infringing the law, he was able to produce a formal authority from the proper quarter to act as he had done.

I am very strongly of opinion that magistrates have not the right, when the formal existing license is produced, to go behind it for the purpose of enquiring, not into the simple issue, is the defendant licensed or unlicensed, but whether certain preliminary requisites have or have not been complied with before the license produced had been given to the tavern-keeper. If they could do so the consequences might be serious. If an insufficient or informal bond be given; if too large a number of licenses be issued; that the tavern had only three instead of four bed-rooms, or stabling for five instead of six horses; or that the inspector has made a mistake in his report as to the applicant's qualifications, &c., &c.,—in this view the justices might adjudicate and convict.

Sec. 34 of the Ontario Act, 32 Vic., ch. 32, provides: "In case any by-law respecting tavern or shop licenses is repealed, altered, or amended, no person shall be required to take out a new license, or pay any additional sum on his license during the time for which the same has been granted."

This seems to shew the desire of the Legislature to protect the interests of any person actually licensed for the current year. The only provisions in the Statute as to invalidating a license seems to be in section 15. The applicant gets his license from the issuer of licenses; then it is said, "provided the license shall be invalid, inoperative, and of no effect until the applicant shall have paid the sum fixed," &c.

In the latter case, if the amount were shewn not to have been paid, I have no doubt there could be a conviction, notwithstanding the production of a license; but in any case not so provided for, I think it contrary to all the ordinary principles of law to treat as a nullity a license issued by the highest authority in the Province, on the ground that some preliminary had not been complied with, and therefore that the license ought not to have issued.

GWYNNE, J., concurred.

Rule absolute.

RUMRELL ET AL. V. HENDERSON ET AL.

Ejectment—Tenancy at will—Statute of Limitations—Alienage—
12 Vic., ch. 197, sec. 12.

In ejectment, it appeared that a son of plaintiff's ancestor had, some three years before the latter's death in 1850, at his instance, moved on to the land in question, for the purpose of working it for him. No rent appeared to have been ever paid by the son :

Held, that there was nothing in this evidence to shew a tenancy at will between father and son, and that the Statute of Limitations did not therefore begin to run against the father during his lifetime, and, consequently, that the plaintiffs, his grandchildren, who were then infants, and claimed under the eldest son, were not affected by it.

It further appeared that plaintiffs' ancestors were aliens; but *Held*, no bar to their recovery, the 12 Vic., ch. 197, sec. 12, having been passed before ancestors' death.

EJECTMENT for the south half of lot 1, in 3rd concession of Blenheim.

Defendants defended for different portions of the lot, but the notice of claim was the same in all the cases, namely, denying title in the plaintiffs, and the Statute of Limitations.

The plaintiffs derived title from one John Rumrell, who was an alien. He came to this Province in the year 1818, and died on the lot in question in September, 1850. Plaintiffs were the children of Stephen Rumrell, who was stated to be the eldest son of John Rumrell. Stephen was

also an alien, having been born before his parents left the United States to reside in Canada: he died on 4th July, 1850, leaving the plaintiffs infants, one of whom was then about four years old, and the other still unborn.

The case was tried before Wilson, J., at the last Woodstock Assizes.

The defence was rested on three objections to plaintiffs' recovery: 1st, That John Rumrell was an alien, and could not transmit any rights to the plaintiffs; 2nd, That Stephen was not the eldest son of John Rumrell, but was an adopted child, or, as was insinuated, was a child of Rumrell's wife, born before his marriage; 3rd, That the Statute of Limitations had begun to run against John Rumrell during his lifetime, and consequently that the plaintiffs were barred.

There was distinct evidence that Stephen was the son of John Rumrell and his wife, and it was not disputed that he had been brought up and educated as such, but certain loose expressions of his mother, as to his not being their child, were sworn to.

The defence under the Statute of Limitations was based upon the following evidence:—

Elizabeth Rumrell said: "I am the widow of Clark Rumrell" (a son of John, but younger than Stephen). "I was married to him in February, 1842. I know the lot in question. I and my husband were living on the lot at the time of John Rumrell's death. I and my husband moved on to it, it will be twenty-three years in April next. Before that we lived in the township of Burford, across the road. John got his son Clark to come across to work the place, as the old man was not able to work the land. The old man said he calculated I should have the land. My husband continued in possession till his death, fifteen years ago last March. I, or my tenants, have continued in possession of the north half of the south half ever since." On her cross-examination she said, "John Rumrell died in his own house on the lot." (This was in September, 1850).

Thomas Sayles stated, "Clark was older than James, and he worked the place at his father's death, and after."

John Henderson said, "I had lived in that township many years before I got the land." (This witness purchased a portion of the land). "I remember John Rumrell. Clark was in possession before his father died."

The above appeared to be all the evidence bearing on the question of adverse possession.

At the close of the case, counsel for defendants submitted that the foregoing evidence proved Clark to have been a tenant at will to his father, which tenancy commenced, as he contended, three years before the death of John Rumrell; consequently, in the absence of any proof of payment of rent on the part of Clark, that his possession would begin to run against John in his lifetime, and therefore, that the right of plaintiffs was barred by the Statute. The learned Judge expressed his opinion that there was nothing in the evidence to shew a tenancy at will created between John and Clark, and that the Statute never began to run against John Rumrell, and, the plaintiffs then being infants, the Statute had no application in this case. Leave was, however, reserved to defendants to move on the objections taken. The jury found for the plaintiffs.

In Michaelmas Term last, *Harrison*, Q.C., obtained a rule *nisi* on the leave reserved.

Ferguson now shewed cause, citing 12 Vic., ch. 197, and 29 Vic., ch. 16.

T. Moss, contra, cited *Irwin v. McBride*, 23 U. C. 570; *Wallace v. Hewett*, 20 U. C. 87; *Wallace v. Adamson*, 10 C. P. 238; *Montgomery v. Graham*, 31 U. C. 57; *Leatherman v. Trow*, 15 C. P. 578.

GALT, J., delivered the judgment of the Court.

I propose to dispose of the last two objections raised on the part of the defence, before considering the question of alienage.

As respects the former of these two questions, upon a careful consideration of the evidence, it appears to me that there could be no reasonable doubt as to the correctness of the finding. In my opinion the verdict was entirely right.

In the opinion of the learned Judge, also, expressed at the trial, on the point as to the tenancy at will, and the Statute of Limitations, I entirely concur. The decision of our Court of Chancery, 18 Grant, 532, in *Truesdale v. Cook*, which was originally tried before me, does not in any degree militate against this decision.

It remains to consider the question of alienage.

John Rumrell, the father, was an alien. Stephen, through whom plaintiffs' claim, was also an alien; and Clark, through whom defendants' claim, was not an alien, having been born in Canada.

By Statute 12 Vic., ch. 197, sec. 12, reserved for the Royal assent, and proclaimed as law on 23rd November, Stephen, 1849, the year before the death of John and it is enacted that "from and after the passing of this Act, every alien shall have the same capacity to take, hold, possess, enjoy, claim, recover, convey, devise, impart, and transmit real estate in all parts of this Province as natural born or naturalized subjects of Her Majesty, in the same parts thereof respectively. It appears that, some questions having been raised as to the effect of this Statute, an Act was passed in 1865, 29 Vic., ch. 16, which, in the preamble, recites that it is desirable that aliens should have the right to transmit and to take real estate by descent, and enacts that "the real estate in any part of this Province of any alien dying intestate, shall descend and be transmitted as if the same had been the real estate of a natural born or naturalized subject of Her Majesty, and every alien shall have the same capacity to take real estate in any part of this Province by descent as natural born and naturalized subjects of Her Majesty in the same parts thereof, respectively; and this provision shall be construed and have effect as if it had been con-

tained in the Act passed in the 12th year of Her Majesty's reign" (the Act above quoted). It is to be remarked that this Act was passed after the judgment of this Court in the case of *Leatherman et al. v. Trow* (15 C. P. 578), and *Irwin v. McBride* (23 U. C. 570), and would seem to have been intended for the express purpose of settling any doubts that may have been raised by the argument of those cases. The case of *Montgomery et al. v. Graham et al.* (31 U. C. p. 57) does not appear to have any direct bearing on the case now before us. We agree in the opinion of the learned Judge, expressed at the trial, that the operation of those Statutes was to confer a title on the plaintiffs, as heirs of John. The ingenious suggestion of Mr. Moss, that, as the Crown is not named in the Statutes, the land would, on the death of John, vest in the Crown without office found, and that a new grant from the Crown to the plaintiffs was necessary, would have the effect of defeating the very object of the Legislature. The observations of Sir John Robinson, in *Doe Hay v. Hunt*, quoted in *Montgomery v. Graham*, appear to be very applicable in answer to such a contention: "Since the Legislature has been content, as regards all future devolutions and transfers of real property in Canada, to abolish wholly the distinction between aliens and subjects, and to allow aliens to acquire an interest in the soil as freely as the others, without limitation or formality, or precaution of any kind; and since this change in our laws and policy has been deliberately sanctioned by the Imperial Government, it ought not to be, by any refined or rigid, or doubtful construction, that we should give effect to a principle of exclusion in regard to any past descent of property, which principle has been now wholly rejected and laid aside as inapplicable to any future descent." It is manifest that no such suggestion as that made by Mr. Moss occurred to the learned Chief Justice.

Rule discharged.

REGINA V. GANES ET AL.

Criminal law—Indictment for murder—Conviction of assault quashed.

Held, following *Regina v. Bird*, 2 Den. C. C. 94, & *Regina v. Phelps*, 2 Moo. C. C. 240, that on an indictment for murder the prisoner cannot be convicted of an assault under 32 & 33 Vic. ch. 29, sec. 5.

CASE reserved by the Chief Justice of this Court, at the last January sittings of the Court of Oyer and Terminer and General Gaol Delivery, at Toronto.

The indictment charged the defendants with murder.

The prisoners pleaded not guilty.

It appeared that Albert and Lavinia Ganes were husband and wife, and Jesse and George Ganes their children, the latter about eleven years old. The deceased Josephine Lane was a child about five years old, whom they had adopted or taken charge of three or four months before its death, which occurred 25th November, A. D. 1871.

The charge was sought to be proved by evidence of general ill-usage, beatings with a leather strap and with sticks, a cut on her arm from a sharp stick, and injuries caused by burns.

The medical testimony was perfectly clear as to the cause of death. The body shewed marks of a most extensive and deep seated burning by fire, so severe that the three medical gentlemen expressed the strongest opinion that she could not have lived more than five or six hours after its occurrence. They also found a small puncture wound penetrating through the scalp to the skull, but not sufficient to cause death. This puncture wound might have been caused by wilful violence, or accidentally by a fall against some sharp point or angle, and might, in their opinion, have stunned the child. The burning was so deep and extensive that they did not think the mere catching fire of her clothes would have caused it, but that, apparently, the child's body must have been for some time on the fire, or close to it. There was no evidence to connect any of the prisoners with the wound in the head or the burning. There were marks and bruises on the body, some recent, some older. The prisoners had persisted in

saying that the child had died of a sore throat, of which there was no trace whatever found on the *post-mortem* examination, and that she had been burned or burned herself some ten days' before her death, but was getting better. The child had been seen by witnesses, apparently in its usual state, the day before its death. The body was reasonably well nourished.

The learned Chief Justice told the jury that there was no evidence sufficient to warrant a conviction for either murder or manslaughter, as the medical testimony made burning the direct and only cause of death. After explaining to them the law as to moderate correction of a child, he told them they might acquit of the felony, and might convict the prisoners, or any one or more of them, of an assault on the deceased: that if more than one was convicted, it ought to be for some joint assault. They were not told that there could only be a conviction for some assault conducing to the death.

The jury acquitted them of the felony, and found all the prisoners guilty of aggravated assault, and the verdict was so recorded.

The opinion of the Court of Common Pleas was requested on this state of facts, and the questions of law arising therefrom, whether the prisoners could have been properly convicted of an assault on the indictment, evidence, and direction to the jury.

Blevins, for the prisoners, cited *Regina v. Bird*, 5 Cox, 20; *Regina v. Dingman*, 22 U. C. 283.

K. McKenzie, Q. C., contra.

HAGARTY, C. J.—I have arrived at the conclusion that we must decide this case on the authority of the *Queen v. Bird*, and that the prisoners here could not have been convicted, on this indictment, of any assault not conducing to the death. In *Bird's* case the charge of murder was on an indictment in the old form, setting out the assaults in terms; beating, wounding, &c. The case was decided

in 1851, and in the following session the law in England was altered. That case was on the law which enacted that, in case of felony, where the crime charged includes an assault against the person, the jury may acquit of the felony and convict of assault. This power was in 1851 taken away, and the present concise form of indictment introduced. By our Statute, 18 Vic. ch. 92, we adopted the same short form, but retained the clause to be found in Consol. Canada, ch. 99, sec. 66.

In *Regina v. Dingman* (22 U.C. 283) our Court of Queen's Bench, in 1863, held that, on an indictment for manslaughter in the short form, "did feloniously kill and slay," *not* stating by what means the slaying was effected, there could not be a conviction for assault: the manslaughter might have arisen from criminal nonfeasance. *Regina v. Bird* is discussed.

So the law remained until 1869. The Procedure Act (Dominion), 32-3 Vic. ch. 29, sec. 51, enacts: "On the trial of any person, for any felony whatsoever, when the crime charged includes an assault against the person, *although an assault be not charged* in terms, the jury may acquit of the felony and find a verdict of guilty of assault against the person indicted, if the evidence warrant such finding, &c."

I cannot see that this enactment in any way takes the case from the operation of *The Queen v. Bird*. It, in substance, places the concise form of indictment for murder or manslaughter on the same footing as if the death were charged by means of a personal assault.

The question in *Bird's* case was whether, assuming that there could be a verdict for assault on an indictment for murder, the assault must have been conducive to the death. The case was singularly like the present. The prisoners were charged with the murder of a young girl, a servant. The Crown proved several acts of ill-usage amounting to assaults, but the medical testimony (as here) conclusively shewed that death resulted from other causes, viz., a severe contusion on the head, with the infliction of which there was no evidence to connect the prisoners or

either of them. The assaults proved did not therefore conduce to the death, but were independent acts of violence. Such is precisely the case here: therefore the jury should have been directed that they could only convict of some assault conducing to the death.

I had occasion to consider this celebrated case of *Bird* in *The Queen v. Dingman*, and I again examined it during the progress of this trial. It is quite useless to raise any further discussion of the point, as it is worn threadbare in the fourteen elaborate judgments delivered. I must say that my individual opinion is wholly with that of the minority of six, consisting of the names of Lord Campbell, C. J., Sir J. Jervis, C. J., Barons Parke, Alderson, Martin, and Maule, J. The argument of that most experienced and skilful criminal lawyer, Sir John Jervis, seems to me most convincing.

I think our judgment must be for the prisoners, and against the Crown.

Bird's case is in 5 Cox. 1, extending over 112 pages. It is also in the series called *English Reports*, Vol. ii.

GWYNNE, J.—The case reserved for our consideration in effect states, that it appeared in evidence, in the course of the trial, that upon several occasions before the occurring of the act or transaction which was the cause of death, the prisoners had assaulted and beaten the deceased, but that those assaults were quite distinct from, and independent of, the cause of death. Upon this statement I take it to be settled law, not only upon the authority of *Regina v. Bird* (2 Den. Cr. Cas. 94), but of *Regina v. Phelps* (2 Moody Cr. Cas. 240), that no verdict of assault could be rendered against the prisoners upon this indictment.

The true rule, as it appears to me, to be deduced from *Regina v. Bird*, and the one best calculated to ensure an efficient administration of justice in such cases is, that inasmuch as the only assaults which are included in the crime charged, in an indictment for murder or manslaughter,

are those which conduce to the death, these are the only ones which are material to the issue and involved in it; and if the accused be found guilty of such assaults, or of any one conducing to the death, then is he guilty of homicide either in the degree of murder or manslaughter. In the language of Erle, J., in that case: "If the assaults and death stand in the relation of cause and effect, the felony is proved; if they do not, the assaults are unconnected with the felony charged, and are no ground for conviction under the statute. According to this reasoning the statute could not, it is true, come into operation in cases of homicide, and in my judgment it is better that it should not, for, in the language of Erle, J., again, whose reasoning appears to my mind to be most conclusive, "it is important for public justice to conduct trials for murder with unity of attention, to free the jury from the necessity of referring the evidence to three alternatives, murder, assault, or acquittal; but it is imperative to release a prisoner on such a trial from liability for various assaults. If the prosecutor is found to be mistaken in supposing the assaults proved conduced to the death, and the prisoner is to be acquitted of felony, it is contended that he must then be convicted of all the assaults which have been proved; but the Legislature cannot have intended that the mistake of the prosecutor should justify an unfair trial, and the trial would not appear to be fair if the prisoner, when defending himself for murder, is also called on for a contingent defence against charges for several alleged assaults, in the course of several weeks, some of which may be open to contradiction, others to justification, and others to mitigation."

The logical conclusion to be deduced from the decision appears to me to be shortly this, that if the prisoner is guilty of an assault which has conduced to the death, he is guilty of felony, and cannot in respect of that assault be convicted of assault merely; and if the assault proved does not conduce to the death, it is distinct from and independent thereof, and is therefore not included in the crime charged, and is *dehors* the indictment; and there-

fore no verdict of assault can be rendered upon an indictment for homicide, in respect of such an assault.

GALT, J., concurred.

Conviction quashed.

MASON (ASSIGNEE) V. HAMILTON.

*Insolvency—Prior distress for rent—32 & 33 Vic. ch. 16, sec. 81—
Construction.*

The 81st section of the Insolvent Act of 1869 (32 & 33 Vic. ch. 16) does not restrict the landlord to one year's rent, where he has distrained for more *before* the insolvency of the tenant, but he is entitled to all that is due within the limitation of six years.

Griffith v. Brown, 21 C. P. 12, distinguished.

THIS was a special case for the opinion of the Court, the point involved being the construction of the 81st section of the Insolvent Act of 1869, and the question whether, where a landlord distrains for rent on the goods of his tenant before the latter comes under the provisions of the Insolvent Act, by executing a voluntary assignment or by being subjected to an attachment in compulsory liquidation, he is, upon the insolvency proceedings taking place, restricted to the recovery of only one year's rent, although more may be due.

James Maclellennan, for the plaintiff, referred to *Woodfall*, L. & T., last ed., 374, 378, 380; *Dor. & McRae*, Bankruptcy, 356-8, 368.

J. H. Cameron, Q. C., contra.

GWYNNE, J., delivered the judgment of the Court.

[After stating the point involved in the case:] It is said there were six years' rent in arrear. In order to put a sound construction upon the Act in question, it is necessary that we should regard the provisions and policy of former Acts, passed in *pari materia*, and the decisions thereon,

By the Imperial Statute, 6 Geo. IV. ch. 16, sec. 74, from which the 48th sec. of our Statute, 7 Vic. ch. 10, was taken, it was enacted, "that no distress for rent, *made and levied after an act of bankruptcy*, upon the goods or effects of any bankrupt (whether before or after the issuing of the commission) shall be available for more than one year's rent accrued prior to the date of the commission, but the landlord or party to whom the rent shall be due, shall be allowed to come in, as a creditor, under the commission, for the overplus of the balance due, and for which the distress shall not be available."

In *Briggs v. Sowry* (8 M. & W. 729) it was held that this section only applied to rent which had accrued due before the bankruptcy, and that therefore where the assignees, under the 75th sec. of 6 Geo. IV. ch. 16, had declined retaining the bankrupt's lease, but the bankrupt had not delivered up the lease to the lessor, the property in the demised premises continued vested in the bankrupt, and his landlord retained, until such delivery up to him, his right to distrain for rent which accrued due *after* the bankruptcy, as well as for that which was in arrear at the time of the bankruptcy.

The Bankruptcy Law Consolidation Act, 12 & 13 Vic. ch. 106, had a section (129) precisely similar, in its provisions, to the 74th section of 6 Geo. IV. ch. 16. It enacted that "no distress for rent, made and levied after an act of bankruptcy, upon the goods or effects of any bankrupt, whether before or after the *issuing of the fiat or the filing of the petition* for the adjudication in bankruptcy, shall be available for more than one year's rent accrued prior to the date of the fiat or the day of filing such petition." In *Paull v. Best* (3 B. & S. 537) it was held that to bring a case within this enactment the act of bankruptcy must be one to which the title of the assignees could relate, and consequently, where an act of bankruptcy had been committed by a tenant on 27th March, 1861, under the Act 12 & 13 Vic. ch. 106, but no attempt was made by any creditor to obtain an adjudication upon it, and on the 11th

October, 1861, the Bankruptcy Act of 1861, 24 & 25 Vic. ch. 134, came into operation, with which sec. 129 of 12 & 13 Vic. ch. 106, remained incorporated, on which day the bankrupt's landlord distrained for four years' arrears of rent, and on the 17th October the tenant, who was not a trader, was adjudicated bankrupt on his own petition, under 24 & 25 Vic. ch. 134, and assignees appointed, it was held that, as the title of the assignees did not relate back to the act of bankruptcy committed in March, but was derived from the filing of the bankrupt's petition for adjudication in bankruptcy, and as the distress was made and levied before that act, although after the act of bankruptcy committed in March, the distress could not be interfered with, nor could the landlord be prevented from recovering thereby his four years' arrears of rent.

It is apparent then, from these Acts, that it was not the policy of the Legislature to impair or in any manner interfere with the common law right of the landlord to levy by distress all rent due to him, not exceeding the six years fixed by the Statute of Limitations, unless the distress should be made and levied after the commission of an act of bankruptcy to which the title of the assignees related back, and so it has been decided in *ex parte Bayly* (22 L. J. Bank. 26). The Imperial Bankruptcy Act of 1869, ch. 71, has given express legislative sanction to this principle. In the 34th section it is enacted that "the landlord or other person to whom any rent is due from the bankrupt, may, *at any time*, either before or after the commencement of the bankruptcy, distrain upon the goods and effects of the bankrupt for the rent due to him from the bankrupt, *with this limitation*, that if such distress for rent be levied *after* the commencement of the bankruptcy, it shall be available only for one year's rent accrued due prior to the date of the order of adjudication; but the landlord or other person to whom the rent may be due from the bankrupt, may prove under the bankruptcy for the overplus due, for which the distress may not have been available."

In our Insolvent Act of 1864, there is no provision

whatever impairing the right of the landlord to distrain for rent in arrear. So long as the goods were on the demised premises they were equally liable to distress after a voluntary assignment to an assignee, or after the appointment of an assignee in compulsory liquidation, as before. The Act providing that the tenant's property should pass to assignees, did not divest the landlord of his right to distrain the goods upon the demised premises; so that, the Act of 1864 being wholly silent upon the point, the landlord's right to distrain remained unimpaired. The Act of 1865 first introduced the clause which we have now to construe, and which is repeated in the Act of 1869.

The object of the Act of 1865 was, it is plain, to remove to a certain extent, for the benefit of the general creditors, the advantage which particular creditors may have acquired before the insolvency by superior diligence. By the 12th section it was enacted that "the operation of the 7th sub-section of section 2, and of the 22nd sub-section of section 3, in the Act of 1864," (namely, those sections relating to the vesting of the property of the insolvent in his assignee), "shall extend to all the assets of the insolvent, of every kind and description, although they are actually under seizure under any ordinary writ of attachment, or under any writ of execution, so long as they are not actually sold by the sheriff or sheriff's officer under such writ."

By the 13th section it was enacted that "no lien or privilege upon either the personal or real estate of the insolvent shall be created for any judgment debt, or for the interest thereon, by the issue or delivery to the sheriff of any writ of execution, or by levying upon or seizing, under such writ, the effects or estate of the insolvent, unless such writ of execution shall have issued and been delivered to the sheriff at least thirty days before the execution of a deed of assignment or the issue of a writ of attachment under the said Act."

And by section 14, it was enacted that "the preferential lien of the landlord for rent, in Upper Canada, is

restricted to the arrears of rent due during the period of one year, last previous to the execution of a deed of assignment, or the issue of a writ of attachment under the said Act, as the case may be, and from thence so long as the assignee shall retain the premises leased."

By the Act of 1869 still further provision is made for the benefit of the general creditors, to the prejudice of a particular creditor who may have obtained judgment and execution.

By the 59th section it is enacted that "no lien or privilege upon either the personal or real estate of the insolvent shall be created for the amount of any judgment debt, or of the interest thereon, by the issue or delivery to the sheriff of any writ of execution, or by levying upon or seizing under such writ the effects and estate of the insolvent, *if before the payment over to the plaintiff* of the moneys actually levied under such writ, the estate of the debtor shall have been assigned to an *interim* assignee, or shall have been placed in compulsory liquidation under this Act."

As relates to landlords, the provision in this Act, namely, section 81, is identical in expression with the 14th section of the Act of 1865, save that it is made to extend to Nova Scotia and New Brunswick, as well as to Ontario. There is however a proviso to the 10th section of the Act of 1869, which may perhaps be found to throw some light upon the point in debate. In that section, which defines the effect of a voluntary assignment made to an *interim* assignee, it is "*provided* that no pledgee of any of the effects of the insolvent, or any other party in possession thereof, with a lien thereon, shall be deprived of the possession thereof without payment of the amount legally chargeable *as a preferential claim* upon such effects, except in the case, hereinafter provided for, of such pledgee or party in possession proving his claim against the estate and putting a value upon his security."

The question now is, what is the proper construction to be put upon the term, "the preferential lien of the landlord for rent," in the 81st section of the Act of 1869.

The term is used as if it had a well-known meaning recognized by law. Now the only case in which a landlord's right to distrain is spoken of as a lien at all, is in the case of his tenant's goods being taken in execution. In that case, it having been held that a landlord could not distrain the goods of his tenant taken in execution, because of their being *in custodia legis*, it was by 8 Anne, ch. 14, sec. 1, enacted that "no goods or chattels whatsoever, lying or being in or upon any messuage, lands, or tenements, which are or shall be leased for life or lives, term of years, at will or otherwise, shall be liable to be taken by virtue of any execution on any pretence whatever, unless the party, at whose suit the said execution is sued out, shall, before the removal of such goods from off the said premises, by virtue of any such execution or extent, pay to the landlord of the said premises all such sum or sums of money as are or shall be due for rent for the said premises, at the time of the taking of such goods or chattels by virtue of such execution, provided the said arrears do not amount to more than one year's rent; and in case the said arrears shall exceed one year's rent, then the said party, at whose suit the execution is sued out, paying the said landlord one year's rent, may proceed to execute his judgment as he might have done before the making of this Act." Chief Baron Gilbert, in his work upon distress, speaks of this Act as giving to the landlord a species of lien upon the goods of the tenant on the demised premises, though seized and taken in execution, and the object and effect of it is to give to the landlord a *preference*, to a certain extent, over the execution creditor: in that sense it may be termed a *preferential lien*. Now, if this Act of Anne be the source from which the term is taken and introduced into the Insolvent Act, then the construction and effect given to the expression in the latter Act should be analogous to the construction and effect given to it in the former Act, from which it is taken; namely, that as an execution creditor, *after execution levied*, cannot have the benefit of the seizure without payment to the landlord of

the rent for the year preceding the taking in execution, that is, preceding the accrual of the execution creditors' title to affect the goods, so neither can the assignee in insolvency remove the goods or appropriate them to the purposes of the Insolvent Act, without payment to the landlord of the rent for one year preceding the accrual of the title of the assignee in insolvency. It is not in virtue of the lessor *having distrained* that the Statute of Anne gives to the lessor a lien on the tenant's goods preferential to the rights of the execution creditor, but in the absence of any distress made. So, upon the like principle, the lien must exist as against the assignee in insolvency, under the Insolvent Act, although no distress had been made. If a distress had been made and levied before the sheriff came in with an execution, the Statute of Anne availed nothing: the distress levied prevailed over the execution. So, upon the analogous principle, the distress levied before insolvency takes place must prevail over the title of the assignee in insolvency. When a distress has been made and levied, the landlord is in possession of the goods distrained, as a pledgee; before the Statute of 2 Wm. & M. as a bare pledgee, but since that Act, as a pledgee with a power of sale. His position, in that case, seems precisely to correspond with the pledgee of the effects of the insolvent, with a lien thereon, mentioned in the above proviso, extracted from the 10th section of the Act of 1869. Mr. Maclennan's argument was, that this lien, acquired by a *previous* distress, was the only lien designated in the 81st section as the *preferential lien*, which was by that section restricted to the one year's rent. He contended that there could be no lien until the landlord, by distraining, had acquired possession; but that construction appears to be not only inconsistent with the proviso to the 10th section, with the terms of which the condition of a landlord who had distrained before insolvency precisely corresponds, but also inconsistent with the latter part of the 81st section itself; for the preferential lien there referred to is regarded as continuing in respect of rent

accruing due after the insolvency, during the occupation of the assignee as tenant. This concluding part of the 81st section would seem to exclude the idea contended for by Mr. Maclellan, that the preferential lien arose in virtue of a distress *made and levied before the insolvency*, and would seem to give some pretext for a construction that the term "preferential lien of the landlord for rent," is used as equivalent to "*the right of the landlord to distrain for rent*," which is restricted to the "arrears of rent during the period of one year last previous to the execution of a deed of assignment, or the issue of a writ of attachment, and from thence so long as the assignee shall retain the premises leased." If this be what was meant, then we must, I think, construe the section as referring to the power of the landlord to distrain *after the insolvency takes place*, and not in any manner as impairing and defeating rights fully, and for good consideration, and *bonâ fide* acquired *before* the insolvency, in virtue of a distress, to which is attached by law the right of retaining possession of the goods distrained as a pledgee thereof, with power of sale, which power nothing can divest, short of payment of all rent in arrear, to the extent of six years' arrears. Of such a right, *bonâ fide* acquired before insolvency, nothing but the most express language can, I think, divest a landlord; and this construction is in accordance with the provisions and the policy of all the bankrupt laws which have from time to time been in force in England, which never professed to deprive a landlord of the rights which he had, in due course of law, acquired by a distress made and levied before the act of bankruptcy; and with us the equivalent to the act of bankruptcy is, the executing a voluntary assignment, or the issuing of a writ of attachment in compulsory liquidation.

The sound principle appears to be that involved in the provision above extracted from the 34th section of the Imperial Bankruptcy Act of 1869 (ch. 71), and what is therein embodied is, I think, the construction we must put upon our Insolvency Act of 1869, in the absence of any

language more explicit than that contained in the 81st section. It may be, and no doubt is, very hard upon the general creditors, and most probably was never contemplated as an event likely to occur, or against which it was necessary to make provision, that a landlord should suffer his tenant to fall in arrear for six years' rent, and immediately upon the eve of insolvency execute a distress warrant, and so obtain a preference over the general creditors; but it would be a dangerous precedent, upon language such as is used in the 81st section of the Act, to deprive a landlord of the benefit which a distress made and levied before the insolvency has been always held to give to him, and which has never heretofore been interfered with by any of the Bankrupt Acts which have prevailed in England or in our own country.

I think the landlord is entitled to maintain his distress for the six years' rent, admitted to have been in arrear when the distress was made. In *Griffith v. Brown* (21 C. P. 12) we held that the landlord was restricted to the one year's arrears of rent accrued due prior to the insolvency; but in that case the title of the assignee in insolvency had been perfected *before* the distress was made.

Judgment for defendant.

WILSON ET AL. V. CAMERON.

Injury to vessel—Unregistered bill of sale—Right of registered owner to sue.

Plaintiffs, being registered owners of a vessel, transferred her by bill of sale, which vendee neglected to register, and in an action by plaintiffs for injury, not of a mere temporary character, sustained by the vessel, vendee came forward as a witness on their behalf:

Held, that defendant could not set up vendee's right to defeat the action, plaintiffs under the Ship Registry Act still appearing as legal owners.

THIS was an action for injury done to plaintiffs' vessel, the declaration charging that defendants' vessel, by his negligent management, ran into plaintiffs' vessel.

Pleas, 1. Not guilty; 2. That vessel was not the vessel of plaintiffs as alleged.

Issue.

The case was tried at Picton, before Morrison, J., and plaintiffs had a verdict for \$1600.

It appeared that plaintiffs' vessel was registered, and a certificate of ownership was produced. According to the latest entries therein, in the year 1864, plaintiffs appeared to be the owners.

George P. Cameron was the first witness. He said he was captain of the schooner, and considered himself the owner; that in 1864 he had purchased her from plaintiffs by bill of sale, but it was not registered up to the time of the trial. He had had possession since 1864.

It was then objected that these plaintiffs could not maintain the action, as they had sold in 1864; that Cameron, the purchaser, who was in possession, could alone maintain the action, and plaintiffs were not in any way damnified. Plaintiffs relied on the Ship Registry Act, that the bill of sale had no effect till registered. Leave was reserved to move on this ground.

In Easter Term last, *J. H. Cameron*, Q. C., obtained a rule *nisi* on the leave reserved.

C. S. Patterson shewed cause. He cited *Mears v. London & South Western Railway Co.*, 11 C. B. N. S. 850; *Tancred v. Allgood*, 4 H. & N. 438; *Walker v. Sharpe*, 31 U. C. 340; *Robertson v. French*, 4 Ea. 130.

J. H. Cameron, Q. C., contra, cited *Sutherland v. Bethune*, 10 U. C. 388; *Taylor* Ev. 2nd ed. 123, and 5th ed. 140; *Sutton v. Buck*, 2 Taunt. 302.

HAGARTY, C. J., delivered the judgment of the Court.

Consol. Can. ch. 41, declares (sec. 13) that when property in any registered ship is sold, the same shall be transferred by bill of sale, containing recital of certificate, &c., otherwise such transfer shall not be valid for any purpose, either in law or equity.

Sec. 16 : No bill of sale *shall pass the property, &c., &c., or have any other effect*, until it has been produced to the collector, &c., nor until the collector has entered in the book of registry of ownership, &c., the name, &c., of vendor, &c., and collector shall endorse particulars of such bill of sale on the above certificate of ownership, &c. Sec. 17 : When so entered in registry the bill of sale shall pass the property, except against subsequent purchasers and mortgagees, who first procure the endorsement to be made on the certificate, &c.

It was not suggested that there has been any change in the law since the Consolidated Statute.

According to the language used in the Act, the present plaintiffs, being the last owners in the register and certificate of ownership, have never legally divested themselves of their property in this vessel. If so, we must still regard them as the legal owners, and the captain must be regarded as either sailing the vessel for them, or at least with their license and assent. He comes forward as their witness, to enable them to recover in this action; so that no difficulty arises as to any defence suggested in his right, or in the nature of a *jus tertii*.

I have no doubt but that the master could have maintained the action in his own name, on his possessory interest. He would, at the least, be entitled to recover as the bailee of the registered owners. If such be his position, the bailors could also maintain an action for any injury of a permanent character, like what was here suffered. See the late case of *Walker v. Sharpe* (31 U. C. 340), and cases there cited : *Tancred v. Allgood* (4 H. & N. 438).

The objection that if plaintiffs recover, the defendant would still be liable to the master, Cameron, cannot prevail. The latter has lent himself to assist plaintiffs in this recovery, and could not I think be heard asserting that any independent rights remained with him.

On the main point the cases are not either very numerous or very directly in point. In *Westerdell v. Dale*

(7 T. R. 306), before Lord Kenyon, it was held that no property whatever passed under a bill of sale which did not recite the certificate of ownership.

Sutton v. Buck (2 Taunt. 302) shews that the vendee in possession, under a transfer, void for non-compliance with the Ship Registry Acts, may maintain trover against a mere wrongdoer. I have no doubt but that the legal owner could also have maintained the action. Nearly all the cases that I have seen are those of defendants' resisting some claim *against* the vessel.

Hibbs v. Ross (L. R. 1 Q. B. 534) refers to most of the cases. It was an action against defendant, as registered owner, by a person injured by falling down the uncovered hatchway of the ship, then being in dock. It was held that the production of the register was *prima facie* evidence, till rebutted, that the persons in charge of the ship were appointed by the defendant. Blackburn, J., states the law in such matters very fully. He says: "The ownership of the ship does not render the owners liable, either in contract or in tort, for the acts of the master and crew, or other persons in charge of the vessel, unless the owners are the employers of these persons."

The position of the case before us seems to be: The plaintiffs, as to all the world, appear as the legal owners. They have made an informal transfer to a vendee, who is in possession. He does not set up his title against them; but, on the contrary, comes forward to assist them in recovering on their own title. The injury complained of is not of a mere temporary or trifling character, but injurious to the whole subject matter. It seems to me that the defendant cannot set up the informal vendee's right (if any) to defeat the action.

In *Wilson v. Heather* (5 Taunt. 642), the assignee of the owner, who had handed over the vessel to a person making advances on her on a bill of sale, void under the Registry Acts, was allowed to recover against the mortgagee or pledgee.

In *Biddell v. Leeder* (1 B. & Cr. 327) an executory agree-

ment to transfer a share in a vessel was held void, as it did not contain a recital of certificate of ownership. Several cases are there cited.

The law has been most substantially altered in England since these cases, and now stands on a very different footing. The Imperial Act of 17 & 18 Vic. ch. 104, makes a great change. That was in 1854 ; but in 1859 our Consolidated Act did not adopt these changes.

Again, in 1862, 25 & 26 Vic. ch. 63, still further relaxes the stringency of the former law. The case of *Stapleton v. Hayman* (2 H. & C. 918) fully explains the changes thus created ; *Abbot on Shipping*, 56, ed. of 1867.

This case was argued to us wholly on our own Statutes, and we decide this case on them. We think the plaintiffs may maintain the action.

On the ground of excess of damages we have considered the evidence and affidavits, and consulted the learned Judge who tried the case. The defendants may have a new trial on payment of costs.

Rule absolute for new trial, on payment of costs.

DEAN V. GRAY.

Action for penning back water—Acquiescence—Bill in equity to restrain similar action—Dismissal for different causes—Obstructing right of way—Former recovery for same—Equitable pleading.

Declaration (1st and second counts), penning back water upon plaintiff's land.

Plea (6th), on equitable grounds, that when plaintiff's ancestor owned the land, S. owned adjoining land, on which, being desirous of building a mill, to be driven by water of stream in question, it was necessary, for such purpose, by means of a dam built upon S.'s land, to pen back stream, and a little to overflow ancestor's land : that ancestor had full knowledge of premises, and consented and agreed with S. that S. should build dam to height specified and agreed between them, and should so raise, pen back, and obstruct stream : that S., relying on such consent and agreement, and upon acquiescence of ancestor, built mill and raised dam to agreed height, and no higher, and in so doing expended large sums of money, ancestor knowing, acquiescing, and consenting to his so doing : that S. worked mill by water raised and penned back by dam, and S., and those claiming under him, always

worked mill and maintained dam with consent and acquiescence of ancestor and of plaintiff, and all others claiming under ancestor: that S. devised in fee "mill and dam and lands on which they were built" to his son, who "granted same" to defendant, who worked mill and maintained dam at height no greater than height agreed between ancestor and S.:

Held, on demurrer, plea good.

Besides demurring, plaintiff replied that a former action had been brought by her against defendant for a similar penning back of the water: that defendant had filed his bill to restrain that action, and had in that bill alleged the same matters now alleged in sixth plea, which bill was dismissed.

Rejoinder, that the Court of Chancery gave no judgment in respect of matters alleged in sixth plea, but dismissed bill in respect of other matters:

Held, on demurrer, rejoinder good.

The 3rd and 4th counts charged defendant with obstructing the plaintiff's right of way from his land over lot 14 to a highway, and back again from highway over lot 14 to plaintiff's land. To a plea denying plaintiff's right to the way, plaintiff replied, by way of estoppel, a former recovery against defendant for obstructing a right of way then claimed by plaintiff from her said land "over lot 14 to a highway, and back again from the highway over lot 14 to plaintiff's land:"

Held, on demurrer, replication good, for that the issue was as to the existence of *any* right of way in plaintiff over lot 14, and *that* was determined by former recovery.

DECLARATION: 1st count, penning back water on plaintiff's land; 2nd count, penning back water on plaintiff's land, in possession of plaintiff's tenant, to the injury of plaintiff's reversion; 3rd and 4th counts, obstructing plaintiff's right of way from his land over lot 14, in 8th concession of Hope, to a highway, and back again from the highway over lot 14 to the plaintiff's land, with an allegation (in 4th count) of injury to plaintiff's reversion.

Plea, to 3rd and 4th counts, plaintiff not entitled to right of way.

6th plea, to 1st and 2nd counts, on equitable grounds, that before plaintiff became possessed of said S. W. $\frac{1}{4}$ of lot 13, one Robert Dean, father of plaintiff, was seized thereof, and said Robert Dean, by his last will and testament, devised same to plaintiff, and said Robert Dean departed this life, and the plaintiff became seised and possessed of the said lands, as devisee under said will, and had no other right or title thereto, and that, in the lifetime of said Robert Dean, one Robert Seaton was seised of land adjoining said S. W. $\frac{1}{4}$ of 13, and called 14, and

was desirous of building thereupon a mill, to be driven by water of stream in said first and second counts mentioned, which stream flowed from said land of Robert Dean to and through said land of Robert Seaton; and it was necessary for purpose of so driving said mill to raise water of said stream by means of a dam built upon said land of Robert Seaton, and in so raising water to pen back and obstruct same, which would by reason thereof unavoidably a *little* overflow and flood said land of Robert Dean; and said Robert Dean had full knowledge of premises, and consented and agreed with said Robert Seaton that said Robert Seaton should build said dam to a height then specified and agreed upon between them, and should so raise, pen back, and obstruct said water, and said Robert Seaton, relying upon such consent and agreement, and upon the acquiescence thereafter mentioned, built said mill and built said dam to height so agreed and specified, and no higher, and in so doing expended large sums of money; and said Robert Dean during time said mill and dam were so being built, was well aware that same were so being built, and that said Robert Seaton was expending said large sums of money in building same, and always acquiesced in and consented to his so doing; and after said mill and dam were so built, said Robert Seaton worked said mill and drove it by said water, and for that purpose raised, penned back, and obstructed said water by said dam, and said Robert Dean always during his lifetime acquiesced in and consented to his so doing: and after the death of said Robert Dean, plaintiff and all persons claiming under said Robert Dean also acquiesced in and consented thereto, and said Robert Seaton and defendant, and all others claiming under said Seaton, always worked said mill and maintained said dam with such acquiescence and consent for upwards of 18 years, until A. D. 1869; and that said Robert Seaton died on or about A. D. 1853, and by his will devised said mill and dam, and that part of said lot 14 on which said mill and dam were built, and through which said stream flowed, to his son Aaron Seaton,

and his heirs and assigns; and said Aaron, after decease of said Robert Seaton, conveyed same to defendant, who entered upon and enjoyed same and worked said mill, and maintained said dam at a height no greater than that agreed upon and acquiesced in as aforesaid.

Replication, to 3rd and 4th pleas, by way of estoppel, the recovery of judgment in a former action by plaintiff against defendant, for obstructing a right of way, at that time claimed by plaintiff, from her said land "over lot 14, to a highway, and back again from the highway over lot 14, to the plaintiff's land."

Replication to 6th plea, that a former action had been brought by plaintiff against defendant for a like penning back of the same water: that defendant filed his bill in Chancery to restrain that action, alleging in his bill the same matters alleged in said 6th plea, and that said bill was upon the hearing dismissed.

Rejoinder, that the Court of Chancery gave or made no judgment or decree in respect of the matters in said 6th plea alleged: that said plaintiff, by her answer to said bill, denied matters alleged in said bill other than the matters in said 6th plea alleged, and it was in respect of such other matters that said bill was dismissed.

Demurrer to 6th plea: Not shewn by said plea that the alleged agreement was binding within the Statute of Frauds.

So far as appeared by plea, it was a mere personal equity which did not pass to defendant.

Not shewn that said Robert Seaton devised alleged right or easement to overflow plaintiff's land to said Aaron Seaton, or that the said Aaron Seaton conveyed same to defendant.

Demurrer to 2nd replication to 4th plea: Not alleged nor apparent, from judgment pleaded, that right of way claimed in the action in said replication mentioned, was same way or was claimed in same right as way claimed in present action.

Not shewn by judgment pleaded, over what part of land

in question way therein claimed existed, and said judgment in that and in other respects uncertain and inconclusive, and could not estop defendant in this action.

Demurrer to rejoinder to replication to 6th plea, as affording no answer thereto.

J. D. Armour, for plaintiff, cited *Gale*, Easements, 24; *Davies v. Mearshall*, 106 B., N. S. 697.

C. S. Paterson, contra, cited Notes to Earl of Oxford's case, 2 W. & T. 548; *Ex. Co. v. Vincent*, 2 Atk. 83; *Stiles v. Cowper*, 3 Atk. 692; *Harryman v. Collins*, 18 Beav. 11; *Davies v. Marshall*, 10 C. B. N. S. 697.

GWYNNE, J., delivered the judgment of the Court.

The 6th plea, which is pleaded upon equitable grounds, in substance alleges that the dam which causes the grievances which are complained of in the 1st and 2nd counts, to which counts the 6th plea is pleaded, was erected under the following circumstances, namely,—that while the plaintiff's father, under whom the plaintiff claims by devise, was seised and possessed of the S. W. $\frac{1}{4}$ of lot 13, in the counts mentioned, one Robert Seaton, under whom the defendant derives title, was seised of lot number 14, in the counts mentioned, which was situate lower down on the same stream as that running through the lot number 13, and being so seised was desirous of erecting a mill upon said lot number 14, to be propelled by the waters of the said stream: that for the purpose of enjoying such mill, when erected, it *was necessary* that a dam should be erected and maintained on the said Robert Seaton's close, of such a height as to pen back the waters of the said stream on to the close of plaintiff's father, and that thereupon, with full knowledge of the premises, namely, of the desire and purpose of the said Robert Seaton to erect the mill, and of the necessity, in order to the enjoyment thereof when erected, of damming back the waters of the stream on to the lands of plaintiff's father, and keeping the same penned back, the

plaintiff's father consented and agreed with the said Robert Seaton, that he, the said Robert Seaton, might erect such a dam on his own ground, to a certain height then specified and agreed upon between them, and might thereby pen back and keep penned back the waters of the said stream on to the lands of plaintiff's father, for the necessary enjoyment of such mill so proposed to be erected : that the said Robert Seaton, upon the faith of such consent, agreement, and acquiescence of plaintiff's father, at very considerable expense erected the said mill, and also for the necessary enjoyment thereof erected the said dam, and merely penned back the water of the stream to the height so agreed upon and no higher ; and that during the progress of the erection of the said mill and dam, and after their erection, until the time of his death, the said father of the plaintiff consented to and acquiesced in such erection and in the penning back of the water occasioned by such dam, in the use and enjoyment of such mill ; and that the said Robert Seaton, his heirs and assigns, of which latter the defendant was one, have ever since continually enjoyed the benefit of such consent and agreement of the said father of the plaintiff, for 18 years, until the year 1869, and that what the plaintiff now complained of was the maintenance of the same dam and the same penning back thereby of the waters of the said stream as had been so consented and agreed unto and acquiesced in by the said father of the plaintiff, in virtue of which consent, agreement, and acquiescence, the obstruction had been so as aforesaid occasioned at the great cost and charge of the said Robert Seaton, for the purpose aforesaid, and enjoyed by him, his heirs and assigns, as aforesaid.

With the evidence which may be necessary to establish the matters here alleged as an equitable bar of the plaintiff's right to complain now of a nuisance occasioned as above alleged, we have at present nothing to do ; but, regarding the case as a point of pleading only, I think there can be no doubt whatever, upon the authority of *Williams v. Earl of Jersey* (Cr. & Ph. 97) ; *Davies v.*

Marshall (10 C. B. N. S. 697), and the judgment of the Court of Appeal in *Henry v. English* (18 Gr. 119), that the plaintiff cannot now complain, as a nuisance at law, of an obstruction so created, and that against his so doing a Court of Equity should and would grant a perpetual injunction. There is nothing in *Hendry v. English* to testify any doubt of the right of a person in the position of the defendant here, to claim the protection of a Court of equity against the proceeding at law by a person in the position the plaintiff here is alleged to be, as claiming through his father against what is alleged to be, if it be proved to be the necessary consequence of the very act which was concurred in, promoted and encouraged by the consent and acquiescence of his ancestor, through whom he claims, and without which consent and acquiescence the person through whom the defendant claims title would not have caused the obstruction or incurred the expense incidental thereto; the plea therefore, assuming it to be true, is a good equitable bar to the action.

The plaintiff replies to it, however, in substance, that on the occasion of a former action at law, brought by the plaintiff against the defendant, in respect of penning back the waters of the said stream, by the same dam, upon the plaintiff's land, the defendant filed his bill against the plaintiff in the Court of Chancery, stating the same identical matters as are now stated in said 6th plea, and praying, among other things, to restrain the said action at law for the same reasons as in the said 6th plea alleged: to which bill the plaintiff put in an answer, and that the cause came down to hearing, and upon the hearing thereof that the said bill was, by the decree of the said Court of Chancery, dismissed out of the said Court with costs.

To this replication the defendant rejoins that the Court of Chancery, in the said suit, made no judgment or decree in respect of the matters in the said 6th plea alleged; but that it was in respect of other matters alleged in the said bill in Chancery, and denied by the answer thereto, that the Court proceeded and made the said decree.

To this rejoinder the plaintiff demurred, and the defendant joins in demurrer. I am of opinion that this demurrer must be overruled.

Where a former suit and a decree upon the hearing dismissing the bill is set up in a subsequent suit as a bar to the question adjudicated upon in the former suit being again brought in question in the subsequent one, the pleading which sets up the former decree must distinctly aver that the matter sought to be again opened was adjudicated upon and absolutely determined in the former suit: it is not sufficient in such a case to plead the former suit and the decree of dismissal, but coupled with that there must be the averment of facts sufficient to shew that the question raised in the second suit had been absolutely adjudicated upon in the first: *Moss v. Anglo-Egyptian Navigation Co.* (L. Rep. 1 Ch. Ap. 115). Now this replication is defective in this particular; but, instead of objecting to the replication as defective, the defendant rejoins, in effect, that the adjudication in the former suit was not in respect of the matters set up in the 6th plea; but for defect of proof of other matter alleged in the bill and denied in the answer, this being admitted by the demurrer to be true, the record shews that the matter set up in the 6th plea was not so adjudicated upon and determined as to be a bar of all further inquiry into the matters in the 6th plea alleged.

The plaintiff also complains of an obstruction by the defendant of a right of way which the plaintiff claims to have from a certain close of the plaintiff's, being the S. W. $\frac{1}{4}$ of lot number 13, in the 8th concession of the township of Hope, across lot number 14, in the same concession, to a certain public highway, and back again across said lot number 14, to the said close of plaintiff.

To this alleged obstruction the defendant pleads that the plaintiff was not entitled to the alleged right of way. To this plea the plaintiff replies, setting forth the record of a judgment in a former action brought by the plaintiff, wherein the plaintiff declared against the defendant for

the obstruction of a right of way claimed by the plaintiff in such former action, in precisely the same terms as above set out in the present action, and to which former action the defendant pleaded in precisely the same terms as above set out, namely,—that the plaintiff was not entitled to the said right of way,—and verdict and judgment recovered in the plaintiff's favor upon such issue, whereby it was adjudged that the plaintiff is entitled to the said right of way, as alleged in the said former action. To this replication the defendant demurs, alleging for cause that the record of the former judgment, recovered as pleaded, does not shew over what part of the close the way established by the former judgment is selected, nor whether the way so established is the same way for the obstruction of which this action is brought.

But it appears to me that upon this pleading no question arises as to the particular site, on the close, of the right of way which is alleged to have been obstructed; nor does any question arise as to whether the obstruction complained of was or not on the part of the particular site of the right of way claimed in the former action. What the former action claimed was a right of way across a particular lot, from the close of the plaintiff, on S. W. $\frac{1}{4}$ of lot 13, to a public highway, and back again across the same lot 14 to plaintiff's close. What the plea in the former action denied was that the plaintiff had any right of way from his said close to the public highway across lot number 14, and back again, as alleged. What the judgment finally determined in his favour was, that he had such a right of way. We must take it then to be conclusively adjudged of record between the plaintiff and the defendant, that the plaintiff at the time of the recovery of the judgment was entitled to such a right of way. Now what the plaintiff claims in this action is in the same precise terms as in the former action, a right of way from plaintiff's same close, across the same lot 14, to a public highway, and back again to plaintiff's close, the same as mentioned in the former action; and what the plea in the present

action denies is, that the plaintiff is entitled to *any* right of way from his said close across said lot 14, as alleged, the very right which it was adjudged in the former action that he was entitled unto. Now the judgment in the former action is alleged to have been recovered in July, 1870, and the present action appears by the record to have been commenced upon 26th September, 1871, so that unless, in the interval between the recovery of the judgment in the former action and the commencement of the present action, the easement established by the former action could have been lost, it must be regarded as still continuing. I can see no way by which it could be so lost, unless it be by a release, which would have to be pleaded. The former recovery, therefore, as pleaded, does, in my judgment, sufficiently establish that the plaintiff is entitled to *a* right of way from his close, on lot 13, across lot 14, to a public highway, and back again, which is what he claims in this action, and which defendant by the plea denies. Whether the obstruction complained of took place or not on the site of the right of way established by the former action, is another question which the plea, *denying any right* of way, does not raise. Upon the whole, therefore, judgment should be for the defendant on the demurrer to the 6th plea, and on the demurrer to the rejoinder to the second replication to that plea, and for the plaintiff on the demurrer to the second replication to the 4th plea.

Judgment accordingly.

WADDELL ET AL. V. JAYNES.

Action on promissory note—Plea of fraud and want of consideration—Non-repudiation of contract.

In an action on a promissory note, evidence was given to shew that defendant was induced to give the note upon misrepresentations, on the part of the payee and indorser, as to the formation of a company, for the sale of a patent right, controlled by the payee, the note being given in consideration of a share which defendant was to have in such company, of which plaintiff's testator was alleged to be one; but it was doubtful whether any such company existed at all, or if so, whether defendant was ever placed in the position of becoming a shareholder: *Held*, that the defendant's not having repudiated and rescinded the contract, under which the note was given, did not preclude him from setting up the defence that it had been obtained from him by the fraud, covin, and misrepresentation of the payee, and that the latter had indorsed it without value to the testator, who was in fact aware of the circumstances under which it had been obtained; for that from the nature of the transaction there was nothing on his part to be repudiated or rescinded.

THIS was an appeal from the County Court of the united counties of Northumberland and Durham.

Plaintiffs, as personal representatives of Archibald Waddell, deceased, declared against defendant on a promissory note made by him, payable to bearer, alleging that testator became the bearer thereof.

Plea, that the note was in the words and figures following, to wit:

"\$100.

COBOURG, May 11, 1870.

"One year after date I promise to pay to Isaac Sheefe, or bearer, the sum of one hundred dollars, value received.

"ROBERT JAYNES."

Averment, that defendant was induced to make, and did make, and deliver said note to said Isaac Sheefe, through the fraud, covin, and misrepresentation of the said Isaac Sheefe, and that the said Isaac Sheefe, in fraud of defendant, indorsed and delivered said note, without value or consideration, to said testator, and said testator took and became the bearer and holder of, and always held, said note, without value or consideration.

There was another plea declaring that Waddell had notice of the fraudulent means by which Sheefe had obtained the note, when he took it from Sheefe.

At the trial, evidence was given to the effect that defendant was induced to give the note upon certain representations made to him by Sheefe in relation to his formation of a company to sell a patent right, of which Sheefe claimed to have the control, and as consideration for defendant having a share in such company, of which Archibald Waddell was represented to be one. The learned Judge was of opinion that there was evidence to go to the jury in support of the plea, namely, that the note was procured to be made by the fraud, covin, and misrepresentation of Sheefe. Plaintiffs, notwithstanding, offered no evidence of Waddell having become holder for value, and there was some evidence given upon the part of defendant from which the jury might properly infer that Waddell had not given any value, and also that he had notice of the nature of the transaction. The learned Judge charged the jury that if the note was obtained by the fraudulent misrepresentations of Sheefe at the time of selling the share, of a character to prevent defendant exercising his judgment on the value of what he was obtaining, the evidence offered being sufficient to go to them for this question, and if, *in addition*, Waddell had notice of the nature of the transaction, or had not given any value for the note, then their verdict should be for defendant; but if their finding should be different on either of these points, then their verdict should be for plaintiff. Upon this charge the jury rendered a verdict for defendant.

The plaintiffs' counsel objected to the charge of the learned Judge, for misdirection, contending that he should have directed the jury that the evidence did not shew any misrepresentation respecting facts material to the subject matter of the sale; 2nd, that Waddell was not shewn to have known that Sheefe's statements were incorrect; and he insisted that defendant, while retaining, as he contended he did retain, some benefit, namely, the right of being a shareholder in the company, could not urge, as a defence, fraud, if any there was, in Sheefe, without utterly repudiating all benefit in the concern, and reinstating the parties in their original position.

In the following term a rule *nisi* was obtained to set aside the verdict, and for a new trial, upon the above objections, which, upon argument, was discharged, when plaintiff appealed, on the following grounds: 1st, that defendant had not repudiated and rescinded the contract, on which the note sued was given, in such a manner as to entitle him to set up the defence relied upon; 2nd, that there was no evidence of any fraud or misrepresentation of any fact material to the contract which induced the defendant to make the note sued on; and, 3rd, that notice of the alleged fraud of plaintiffs' testator was not shewn, nor that he held or took the said note without value.

H. Cameron, for the appeal, cited *Clarke v. Dickson*, E. B. & E. 148; *Deposit Life Assurance Co. v. Ayscough*, 6 E. B. & E. 761; *Adams v. Nelson*, 22 U. C. 199.

Kerr, contra.

GWYNNE J., delivered the judgment of the Court.

Of the three reasons of appeal, the only one urged in argument before us was the first.

There undoubtedly was evidence to go to the jury in support of the fraud and misrepresentation, charged in the plea, as the means by which Sheefe procured the defendant to make the note. It was for the jury to attribute to it such weight as they should think fit; but it must have been submitted to them, and we think that upon it the jury might, not unreasonably, have inferred that the alleged company was a myth, and the shares in it not only worthless, but ideal.

There being evidence to go to the jury upon the plea of fraud, the charge of the learned Judge was, we think, more favorable to the plaintiff than it should have been; for, upon the defendant offering sufficient evidence to go to the jury upon the question of fraud in the inception of the note, the onus lay upon the plaintiffs to shew that their testator had given value; and if he had given value, then only would it have been necessary to inquire into

the point raised by the other plea, namely, that when Waddell took the note from Sheefe he had notice of the circumstances of fraud attending the procuring the note to be made. No evidence of value given by Waddell having been offered, the defendant was entitled to a verdict if the jury should be of opinion that the note was obtained by fraud and misrepresentation, as pleaded, without more: *Bailey v. Bidwell*, 13 M. & W. 73; *Smith v. Braine*, 15 Jur. 287; *Harvey v. Towers*, 6 Ex. 656.

As to the first reason in appeal, which was the point argued before us, we do not think that for anything in it contained the verdict should be disturbed; not from any doubt as to the correctness of the principle there stated, but because of its inapplicability to the present case. In the *Deposit and General Life Assurance Co. v. Ayscough* (6 El. & Bl. 761) the company were suing the defendant for instalments upon shares held by him in the company. He pleaded that he was induced to become a holder of the shares through the fraud, covin, and misrepresentation of the plaintiffs. There, as observed by Lord Campbell, C. J., the record was consistent with the fact that the defendant was keeping the shares and taking the benefit of them, but refused nevertheless to pay the calls; and Crompton, J., there said: "When the record shews that the contract has been executed so far that the defendant has received a benefit, I have doubted whether, in an action on the contract, the plea of fraud must not shew that he has restored what he has received." And again: "I think that if in such a case as this fraud can be made a defence at all, the plea must shew that the defendant had done no acts to make himself a shareholder except those induced by fraud, and that as soon as he discovered the fraud, he disaffirmed the transfer to him, and gave up the shares, and that he ceased to be a shareholder."

In *Clarke v. Dickson et al.* (El. Bl. & El. 148) it is said to be settled law that a contract induced by fraud is not void, but voidable, at the option of the party defrauded; "Hence," says Crompton, J., "it seems to follow that when

the party exercises his option to rescind the contract, he must be in a state to rescind; that is, he must be in such a situation as to be able to put the parties into their original state upon the contract. When you enunciate the proposition that a party has a right to rescind, you involve in it this qualification: if the state of things is such that he can rescind, if you are fraudulently induced to buy a cake, you may restore it and get back your money, but you cannot both eat your cake and return your cake."

So, likewise, it may be said that the proposition that a party has a right to rescind involves this qualification, that there is something to be rescinded. Now what the defendant insists here is, that from the nature of the transaction, as appearing in the evidence, he has nothing to disaffirm—nothing to repudiate—nothing to return; for that the fraud committed upon him was such that he received nothing whatever; that he has nothing, therefore, which he can return; that he alone was the giver, namely, of his note, which is the only thing to be rescinded. The evidence leaves in doubt the existence of any company, and if there were a company in existence, there is no reason to believe that Sheefe ever procured the defendant to be placed in the position of being a shareholder. The suggestion of the defendant is, that the whole transaction was fraudulent and ideal, and of this opinion the jury appears to have been, and as we think, not without sufficient reason.

The case resembles *Harvey v. Towers* more than the cases cited on behalf of plaintiff.

Appeal dismissed, with costs.

LAKE SUPERIOR NAVIGATION COMPANY V. MORRISON.

Action for calls—Subscription for stock—Allotment unnecessary.

Defendant subscribed for certain shares of plaintiffs' stock, an incorporated Company under 27 & 28 Vic. ch. 23, and bound himself to pay as required by the Board of Directors. Somewhat over half the capital stock was subscribed for in this way:

Held, no answer to plaintiffs' call on defendant for the amount of his stock, that there had been no *allotment* of shares and defendant was not therefore a shareholder. *Held*, also, that plaintiffs were entitled to call in all the unpaid stock at one time, as the Act did not prevent their so doing.

The statute provided for the issue of Letters Patent on half the capital being subscribed, though no express provision was made as to when the Company should commence business; but the plaintiffs had commenced business with defendant's full knowledge, and he was, in fact, elected and acted as a director and never resigned his position as such:

Held, that he could not deny his liability to pay his stock on the ground that *all* the stock must be subscribed before calls could be made; that the directors were warranted, on a proper construction of the Act, in commencing business, one-half the stock being subscribed, and in making the necessary calls therefor.

ACTION for calls on stock, the declaration alleging that defendant was the holder of two shares in the plaintiffs' stock in respect of a call for the full amount of the shares, viz., \$1000, duly made, &c., under Acts of Canada 27 & 28 Vic. ch. 23, 29 Vic. ch. 20, and 29 & 30 Vic. ch. 23, and by virtue of plaintiffs' charter.

Plea, never indebted.

The case was tried at Toronto, before Galt, J.

It was proved that plaintiffs obtained the charter produced. Another case was tried on the same day, at suit of these plaintiffs, against Shedden, and a verdict was entered for them in the present case, the same evidence being considered to have been taken in both. It was found that a stock book was signed by the shareholders with the following heading: "The Lake Superior Navigation Company (Limited), under Acts 27 and 28, 29 and 30 Vic. Proposed capital, \$64,000. 128 shares—\$500 each. We, whose names are hereunto subscribed, hereby agree to take the number of shares set opposite our respective names, and we also severally, each for himself, his heirs, executors, and administrators, and

not jointly, or the one for the other, bind ourselves to make payments thereon, and to do all other matters and things in relation to the same as required by the Act or Acts of Incorporation, or that may be required by the board of directors of the said company."

Many names were attached; amongst others that of the defendant, who signed and sealed it 13th March, 1871, after the issue of the letters patent. The actual subscription was said to be sixty-one, but originally two shareholders (Carruthers and Perry) were down for twenty each, and this was afterwards altered to ten each. The defendant was appointed a director, one of five. The first meeting, at which defendant was present and was elected a director, was 14th March, 1871. Defendant attended a directors' meeting next day. There was a difference about the appointment of the treasurer, and defendant swore that after opposing the person proposed as treasurer, he said he would have nothing further to do with the company. The company had purchased a vessel, and applied moneys therefor. A call was made, by a by-law, put in at the trial, dated 7th August, 1871, directing all the unpaid subscriptions to be paid on or before 26th August instant, and that notice be sent on or before 10th August instant.

It was proved that notice was sent to defendant 8th August, 1871.

Counsel for defendant objected: "That, as there was no proof any allotment of shares, defendant was not a shareholder; that the mere fact of subscription in the book did not constitute a stockholder; that the company had no power to call in the whole stock at one time; that defendants were not shewn to have been duly incorporated, upon the ground the stock subscribed was not sufficient; that there was no power to make calls until the whole stock was subscribed.

Leave was reserved to move on these grounds.

Defendant was then examined, and the learned Judge found for the plaintiffs, that defendant had acted as a shareholder and had with his own consent been elected a director, and acted as such,

In Michaelmas Term, *Harrison*, Q. C., obtained a rule on the leave reserved, also for a new trial for misdirection on the same grounds, and that his acting as director did not estop him from denying that he was a stockholder.

Duggan, Q. C., and *McMichael*, shewed cause. They cited *Mid. G. W. R. Co. v. Gordon*, 16 M. & W. 804; *Burke v. Lechmere*. L. R. 6 Q. B. 297; *Evans's Case*, L. R. 2 Ch. App. 427; *Migotti's case*, L. R. 4 Eq. 238; *Burnes v. Pennell*, 2 H. L. Ca. 497; *Lindley*, last ed., 133, 134, 619, 635, 638, 885, 887.

Harrison, contra, cited *Wontner v. Shairp*, 4 C. B. 404; *Duke v. Andrews*, 2 Ex. 290; *Edmunds v. Newry & Ennis-killen R. Co.*, 2 Ex. 118; *Gal. Iron Co. v. Westory*, 8 Ex. 17; *Wolverhampton &c. Co. v. Hawksford*, 6 C. B. N. S. 336; *New Brunswick & Can. R. Co. v. Mugeridge*, 4 H. & N. 160, 580; *Howbeach Coal Co. v. Teague*, 5 H. & N. 151; *London &c. R. Co. v. Freeman*, 2 M. & G. 606; *Selwood v. Lock*, 1 Q. B. 736; *Sheffield R. Co. v. Woodcock*, 7 M. & W. 574.

HAGARTY, C. J.—The charter of plaintiffs' company is dated 21st February, 1871, and purports to be granted under 27-8 Vic. ch. 23, passed in 1864.

By section 3, various matters have to be ascertained before the charter is granted. Not less than one-half of the proposed capital must be subscribed, and ten per cent. thereof, or five per cent. of the whole capital, when it does not exceed \$500,000, has been paid in, &c.; that the letters patent shall be conclusive evidence of all the requisitions of the Act being complied with. It states the number of shares to be 128, of \$500 each. The subscribed stock was \$32,500, and amount paid in \$3,400.

By sub-sec. 7, of sec. 5, the directors had full power to make by-laws to regulate the allotment of stock, the making of calls thereon, the payment thereof, &c., &c. Sub-sec. 10: Directors may call in, &c., all sums of money subscribed at such time and place and in such payments or instalments as the by-law of this company may require

or allow. Sub-sec. 11: Not less than ten per cent. on the allotted stock, shall by one or more calls be called in within a year from incorporation, and at least ten per cent. for every after year.

It appears by a printed book, put in at trial, that there was a general meeting held 24th April, 1871, at which various by-laws were made for opening of stock book, for subscription and general management of the company, and that the whole of each subscription to the capital stock then unpaid, should be called in and payable on or before June 15, 1871.

I do not think that the large class of cases on the English system of applying for shares, and the allotment thereof by the directors, can affect the decision of the present case. Beyond the already quoted expressions in the Act, as to their having power to pass by-laws for the allotment of stock, &c., there is nothing in the Act affecting the matter.

If there had been applications to the directors for shares, offering to take stock, and, as often happened, to an amount exceeding the number to be taken, we can easily see how important the question of allotment would be. A man may signify his readiness to take stock, and desire to have a certain number of shares, and unless some shares were allotted to him it could not be said that he was the holder of any shares. In the case before us the proceeding was of a totally different character. Parties were canvassed to take stock, and by the act of subscription they actually subscribed for a specified number of shares, and expressly bound themselves to make payments thereon as might be required by the board of directors. Little over half the capital stock was subscribed for, and no question did or could arise, from the course adopted, as to any act to be done by the directors to allot any number of shares.

I see nothing in the objection as to calling in all the unpaid stock in one call. There is nothing in the Statute or the charter to prevent such a course, and it might be in the starting of this, and many other similar enterprizes, of

vital importance that the stock should be at once paid up. By the express terms of the act of subscription the defendant bound himself to pay as required by the directors. All the Legislature did was to prescribe a time within which the stock must be paid. No restriction is imposed on calling it all in at once.

In all the cases cited by Mr. Harrison there were provisions, either in the statutes or the deed of settlement of the companies, as to what should constitute a shareholder. A register of shareholders is directed to be prepared; and in one case cited, *New Brunswick R. Co. v. Muggeridge* (4 H. & N. 580), the Act expressly declared that no person should be deemed a shareholder unless he complied with the requisitions of the Act.

Our Statute does not prescribe any form necessary to be followed in becoming a shareholder. Sub-sec. 19 directs the company to cause a book to be kept, containing, amongst other things, "the names alphabetically arranged of all persons who are or have been shareholders," and prescribes certain rules as to transfers.

I see no right on our part to insist on any more formal or positive act to constitute a shareholder than the unequivocal instrument to which the defendant's hand and seal are set. It was also objected that all the stock must be subscribed before calls were made. Our Statute allows the issuing of letters patent on half the stock being subscribed, but nothing is expressly said as to when they may commence business. In *The Galvanized Iron Company v. Westoby* (8 Ex. 22) Parke, B., says: "It is well established that if a person apply for shares in a perfected company, the capital of which is to consist of a definite number of shares, that is a condition precedent, and unless the entire amount of capital is subscribed for, the person so applying does not become a shareholder. It is true, he may waive the condition, or if he signs the deed he is bound by its terms." He refers to *Pitchford v. Davis* (5 M. & W. 2), where the principle is fully discussed.

In the case before us the business was undoubtedly com-

menced; and the defendant, with full knowledge of the state of the subscriptions, attends a meeting, is elected a director, acts as such; and, although after the quarrel as to the treasurer, he is not proved to have acted further, yet he is said never to have formally resigned, and his place at the board was not filled up. I think he cannot now be heard denying his liability to pay up his stock.

In the case cited of *Howbeach Coal Co. v. Teague* (5 H. & N. 151) Martin, B., says that he has a strong opinion that if a company be formed to consist of 240 shares, and hardly one-quarter are taken up, it cannot be competent for a small portion of the shareholders to make calls on those who hold such limited number of shares and carry on the company against their will. Watson, B., says he expresses no opinion whether as to the number of shares that should be subscribed in order to authorize the directors to make calls, but his impression accords with that of Martin, B. Channel, B., says he gives no opinion whether, in order to make a valid call, it is necessary that the shares, or a large proportion of them, should be taken up. Pollock, C. B., joins with the others in deciding the case for defendants on a different ground. The facts of the case are very peculiar, and the call was wholly improper on many grounds.

I think we may take it that our Legislature has fixed an amount, viz: half the proposed capital as a reasonable amount of actual subscription to warrant the commencement of the organization and operation of each undertaking, and that the grave doubts of Martin, B. need not influence us in the case before us. Our Act says, "Every company so incorporated &c., shall be a body corporate, &c., capable forthwith of exercising all the functions of an incorporated company as if incorporated by a special act, &c."

It seems to me that we must assume that as soon as incorporated the company might commence active operations. If so, the capital actually subscribed must be available for the exigencies of the business and for debts contracted and liabilities incurred on their faith as so much assets, and I

can see no valid reason to prevent the directors exercising their right to make calls.

The Court of Equity could, I assume, promptly interfere to prevent any *mala fide* attempt to enable (in Martin, B.'s, language) "a small fraction of the shareholders making calls on those who hold a limited number of shares, and carrying on the company against their will." I see nothing in this case to induce a belief that any thing improper is attempted to be done, or unfair advantage taken.

GWYNNE, J.—The only point which, upon the argument, seemed to me to require further consideration, was that made upon the authority of the observation of Martin, B., in *Howbeach Coal Co. v. Teague* (5 H. & N. 151), to the effect that the whole or at least the substantial portion of the capital should be subscribed before it was competent the directors to make calls. The force of those observations appears to me to be based upon the foundation that, in that case, in the opinion of the learned Baron, the company was not formed until such substantial part of the capital should be subscribed. "It must," he says, "surely be impossible to make calls before the company is formed."

In the case before us, the Statute 27 & 28 Vic. ch. 23, and the letters patent issued thereunder constituting the company, afford, as it appears to me, a complete answer to all the objections to the plaintiffs right to recover which have been urged on behalf of the defendant. The parties applying for letters patent of incorporation are required by the statute to give at least one month's notice in the "Canada Gazette" of their intention to apply for such letters patent, stating therein, among other things, the object or purpose for which incorporation is sought; the amount of the nominal capital of the company; the number of shares, and the amount of each share; the amount of the stock subscribed, and the amount paid or to be paid in before the charter is granted.

Now the object of this notice, as it seems to be, is, among other objects, to enable the government to form an opinion

whether or not the amount of capital provided, and the amount proposed to be paid in before the charter is granted, is adequate to the object and purpose of the incorporation, and sufficient to justify the government in granting letters patent, to which, when granted, such extensive power is annexed by the Statute. But before letters patent shall be granted, the Statute requires that the minister or officer, to whom the duty of reporting on the application to the government shall be assigned, must be satisfied that not less than one-half of the whole proposed capital has been subscribed in good faith, and that ten per cent. thereof, or five per cent. of the whole capital, when it does not exceed \$500,000, has been paid in to the credit of trustees for the company, and still remains at the credit of the said trustees in one or more of the chartered banks of the Province.

One half of the proposed capital *must* be subscribed for in good faith before letters patent *can* issue, but the Government may nevertheless require that a greater proportion should be subscribed, if they should think that the purpose would require a greater proportion before the company could be expected to be able to go into operation, before the letters patent shall be granted. It may be that, for the purpose of commencing the operations of a company, and that for carrying on these operations for the first few years of the company's existence, no more than one half of the proposed capital could be beneficially used, and that the residue was stated as part of the proposed capital to enable the company, as its business should increase, and its success should be secured, from time to time to extend its means of carrying on its operations without increasing its capital stock. In such a case it would be quite prudent to sanction the company having at the outset a larger capital stock than the proposed operations of the company in its infancy might require. When the letters patent, however, are granted, they are made conclusive evidence that all the requisitions of the Act have been complied with, and the company thereby becomes completely formed and constituted, with full powers of exercising *all* the functions of an

incorporated company, and necessary for the carrying on its operations, and among those powers are specially enumerated the power to elect directors who shall have full power in *all* things to administer the affairs of the company and to make for the company any description of contract which the company may by law enter into; to make by-laws; to regulate the making calls on stock; the appurtenant functions, duties, and removal of all agents, officers, and servants of the company, and the control in all particulars of the affairs of the company. Then the Act declares further that the company may enforce payment of all calls and interest thereon by action, and in such action it shall not be necessary to set forth the special matter, but it shall be sufficient to declare that the defendant is a holder of one share, or more, stating the number of shares, and is indebted in the sum of money to which the calls in arrear amount, stating the number of calls and the amount of each, "whereby an action hath accrued to the company under the Act." The effect of letters patent so issued is, as it seems to me, the same as if a special act provided that it should be competent for the company to go into complete operation, to make calls and sue therefor, whenever such proportion of the capital is subscribed as by the letters patent, issued under 27 and 28 Vic. ch. 23, is recited as being subscribed before *their* issue.

It was said that since the issue of the letters patent the company have authorized a reduction of the capital subscribed to an amount less than the half of the proposed capital which had been subscribed when the letters patent issued. It may be that such conduct is illegal, and therefore ineffectual to effect the contemplated purpose, but any remedy in respect thereof would have to be sought in a Court of Equity, or by process to annul the letters patent, if the alleged conduct be, as it perhaps may be, a fraud upon the Acts and the letters patent; but in the present action we must be concluded by the letters patent (which give complete power to the company to carry on its operations, to make and enforce calls), and which are declared by the Act

to be conclusive evidence that all the requisitions of the Act have been complied with.

GALT, J., concurred.

Rule discharged.

GOLLOGHY V. GRAHAM.

Action against insolvent—Plea of discharge—Concealment of assets—Evidence.

In an action on a promissory note, with a plea of discharge under the Insolvency Act, and replication that the discharge was obtained by fraud, inasmuch as defendant had concealed from the assignee certain promissory notes, it appeared from his own evidence that defendant, several months before his assignment, which was voluntary, desiring to raise money on his farm, one-fifth of which belonged to his wife, the value of her interest not being stated, gave his wife at least \$300 of notes, she otherwise refusing to consent to a mortgage of the farm. It further appeared that defendant had attempted to collect the notes, as he alleged, for his wife, and that the mortgage had been nearly paid off, but by what means was not shewn:

Held, affirming the judgment of the County Court, that the plaintiff was on this evidence entitled to recover.

APPEAL from the County Court of the County of Hastings.

To a declaration on a promissory note defendant had pleaded his discharge under the Insolvent Act, to which plaintiff replied that the discharge granted by the Judge was procured and obtained by fraud in this, that defendant did not furnish a statement of all his assets, &c., but corruptly and fraudulently retained and concealed certain of his personal property, viz., three notes for \$200 and \$100, and \$150, and plaintiff knew nothing of this till after defendant's discharge, &c.

ISSUE.

At the trial it was proved that defendant made an assignment 26th August, 1869.

No schedule of his debts or assets could be found. The discharge was obtained without consent of creditors, on application to the Judge. One Grainger had given notes to defendant, one dated 6th April, 1869, the other 25th April, 1869, and one said to be dated 26th August, 1869, the date of the assignment. Defendant had since his assignment applied to Grainger to pay them, and told him his wife owned them.

A nonsuit was asked for on the ground of no sufficient evidence of fraud. Leave was reserved to move, and defendant was called on his own behalf. He swore that in April, 1869, he had the two notes against Grainger; that his wife owned one-fifth of the farm on which he lived, he owning the other four-fifths; that she joined him in a mortgage for \$1000 to raise money, to which she had refused to consent until he agreed to give her the notes against Grainger. On this mortgage \$900 appeared to have been paid, but by whom was not stated. One of the notes was renewed in the name of his wife's brother, to whom witness thought his wife gave them when he went into insolvency.

The learned Judge left it to the jury to say whether the notes were withheld as alleged; that if so he thought there was a fraudulent concealment, but if they believed defendant's statement as to the transfer, he thought it could not be looked on as a fraudulent concealment. The jury found for plaintiff, and a rule obtained on the leave reserved was, after argument, discharged, when defendant appealed.

F. Osler, for the appeal, cited *Watson v. Earl of Charlemont*, 12 Q. B. 862; *Daughlish v. Tennent*, L. R. 2 Q. B. 49; *McLean v. McLellan*, 29 U. C. 548; *Thompson v. Rutherford*, 27 U. C. 205, 208; *Hawden v. Haigh*, 11 A. & E. 1033.

R. P. Jellett, contra.

The sections of the Statute relied on are referred to in the judgments.

HAGARTY, C. J.—I think the learned Judge was right in declining to nonsuit. If any question existed as to deficiency of evidence, the defendant's evidence removed it. I think the jury properly found on this evidence for the plaintiff, and we think the learned Judge right in reporting that he considered his charge too favorable for defendant.

The defendant's evidence discloses a most suspicious transaction. Four months before his voluntary insolvency

he wants to borrow \$1000: his wife owns one-fifth of the farm; no statement whatever as to the value of the wife's interest is given, whether it was worth \$50 or \$500; at least \$300 of notes are given to his wife, absolutely we may gather from his statement, but possibly only to secure her. These notes were certainly withheld from the assignee and attempted to be collected by the insolvent, as he says, for his wife.

It is also said that the mortgage is nearly paid off. If so, out of what means? Not apparently by the wife, or from the proceeds of these notes.

Had it even been a stranger who had become security for the defendant to raise money, and he had given to or deposited with him these notes for his security, we think he was bound to communicate the facts to his assignee.

Mr. *Osler* urged that such a fraud as this would not vitiate the discharge. If this be so, the law must be most ineffective, as a fraudulent man might hold back the best part of his estate, conceal it from his creditors, and as soon as his discharge was obtained, set his creditors at defiance. We cannot accede to this construction. It is clear that under the Act of 1864, sub. 6, sec. 9, creditors may oppose an insolvent's discharge on the ground (amongst others) of "fraudulent retention and concealment of some portion of his estate or effects," and sub. 11 applies this to the kind of discharge obtained by this insolvent.

Sub. 13 declares every discharge, &c., which has been obtained by fraud or fraudulent preference, &c., &c., shall be null and void. It would be very singular if the insolvent's success in baffling a creditor's enquiry, on the application, into a matter which, if disclosed, would prevent the discharge, could not be urged, when discovered, against a discharge obtained by its fraudulent concealment.

The Act expressly avoids a discharge obtained by fraud. No greater fraud can be suggested than obtaining a discharge from a number of just debts on the express ground of having given up all assets, while at the same moment the debtor retains in his control the means of satisfying a

portion if not all of those debts. The case was left to the jury, as the learned Judge remarks, much too favorably for defendant, and we see no reason on which their verdict for the plaintiff should be disturbed. In the view we take it is unnecessary to discuss whether, under any circumstances, the defendant could have lawfully acted as he says he did.

This Court rarely, if ever, interferes on the weight of evidence.

GWYNNE, J.—I am of opinion that the learned Judge could not have done otherwise than submit to the jury the issue which was joined. A nonsuit under the circumstances in evidence could not have been sustained.

That the defendant did transfer certain promissory notes to his wife, which, if not so transferred, should have formed part of his assets assigned to his assignee is admitted. The defendant says this was done *bonâ fide* and for good consideration, and he had the opportunity of giving his own account of the transaction to the jury; but there is no doubt that there were matters stated in evidence calculated to give to the transaction the colour of fraud, and the jury have come to the conclusion that it was done by way of fraudulent concealment, a conclusion to which they were assisted probably from the circumstance that the defendant, although he made an assignment, does not appear to have made out or transferred to his assignee a schedule of any assets whatever; but with the correctness of the finding of the jury we have nothing to do upon this appeal.

By 32 and 33 Vic. ch. 16, sec. 108, it is enacted, among other things, that "every consent to a discharge or composition, and every discharge, or confirmation of any discharge or composition, which has been obtained by fraud or fraudulent preference, or by any fraudulent contrivance or practice whatever, tending to defeat the true intent and meaning of the provisions of this Act in that behalf, shall be null and void; and by the 106th section it is enacted that, upon the insolvent's application for his discharge,

whether such application be contested or not, it shall be incumbent upon the insolvent to prove that he has in all respects conformed himself to the provisions of this Act.

Now no plainer violation of the intent and of the express provisions of the Act can well be conceived than for an insolvent to suppress, conceal, and withhold a portion of his assets. When such a fraudulent concealment has been committed, a discharge obtained by means of the concealment of such fraudulent concealment, and upon the representation that the insolvent had, in all respects, conformed himself to the provisions of the Act, must be held to be made null and void by the 108th section. Of such fraudulent concealment the jury have found the defendant to be guilty, upon evidence which by no possibility could have been properly withheld from them. The appeal must therefore be dismissed with costs.

GALT, J., concurred.

Appeal dismissed, with costs.

BUTTERFIELD AND WIFE V. MABEE ET AL.

Statute of Limitations—Tenant at will.

A. & B. being the owners in fee of certain lands, sold them to C., and in 1836 executed conveyances, but continued in possession as before. In 1850 D., claiming to hold a deed for the lands, executed by the heir-at-law of C. then dead, got possession of the lands from A. & B., under the belief that he was the grantee of C.'s heir-at-law. D. then conveyed the lands to defendants, or to persons under whom they claimed. These went into possession in 1850 or 1851, and continued in possession till 1868, when the real heiress of C. brought ejectment against them, who claimed by possession. It appeared that the deed executed by D. was a fraudulent instrument not executed by C.'s heir-at-law, but by some stranger:

Held, that the title of C. was barred by the Statute of Limitations.

EJECTMENT for four acres situate on the west half, and two acres, eighty-six perches, situate on the east half of lot No. 17 in the broken front concession A of the Township of Walsingham.

Plaintiffs claimed in right of the married woman plaintiff, who claimed as sole heiress-at-law of Harold W. Graves, deceased, who was the son and heir-at-law of Hiram W. Graves, deceased.

On the 31st day of May, 1836, by a deed of that date, which was not produced, but a memorial of which was produced from the registry office by one Wilhelmus Wolven, who was then seised in fee of the west half of the said lot No. 17, conveyed in fee the four acres, part thereof, sought to be recovered in this action, to Hiram W. Graves, described in the deed as late of the City of Cleveland, in the State of Ohio, but now of the Township of Bayham, in the County of Middlesex, yeoman.

On the 2nd day of June, in the same year, by an indenture of that date, which was not produced, but a memorial of which was produced from the registry office, Jeremiah Wolven and Catherine his wife, who were then seised in fee of the east half of the said lot No. 17, in right of the said Catherine, conveyed the two acres and eight-six perches, part of the said east half which are sought to be recovered in this action, to the same Hiram W. Graves in fee simple.

William Wolven, a son of the said Jeremiah and Catherine Wolven, who was the only witness called to speak of these purchases, said that he knew Hiram W. Graves, and that he recollected his father and mother and Wilhelmus Wolven, who was his uncle, selling to Graves the above respective parcels of the east and west halves of the lot 17, and that he was present when the deeds were drawn. It was said that Graves came from Cleveland, in Ohio, and witness thought that he left Port Rowan the day after the deeds were executed, and witness never saw him after. The witness further said that no change was made in the occupation of the land after Graves bought; that his father and mother and his uncle, respectively, used the respective parcels sold by them the same as they did before the sale, until some time in the year 1850, when a man of the name of Filkins came round Port Rowan and represented to

witness's mother and uncle, that he had a deed of the respective pieces of land from Isaac Graves, who he said was the son of Hiram W. Graves, and upon that representation witness's mother and uncle gave up possession to Filkins of the respective pieces of land which Hiram W. Graves had bought from them. Witness finally said that neither his mother nor his uncle ever made any declarations, after the sale to Graves, as to the terms upon which they held the lands they had sold to him. Defendants claimed by paper title derived from the man Filkins, and by length of possession, contending that the Statute of Limitations began to run against Graves from the dates of deeds executed in 1836, or at latest at the expiration of a year therefrom.

It appeared in evidence that Hiram W. Graves, the father of the plaintiff Mrs. Butterfield, died on the 24th June, 1850, leaving Harold W. Graves, his only son and heir-at-law, him surviving, and that *he* died unmarried in 1854 or 1855, leaving Mrs. Butterfield, his only surviving sister and sole heiress-at-law, him surviving. Both Hiram W. Graves and his son Harold W. Graves died in the United States, the former at a place called Bedford, in the State of Ohio, where he had resided for years.

The deed from Isaac Graves to Filkins was not produced, but a memorial of it from the registry office was produced, which bore date the 4th September, 1850, and purported to be the memorial of a deed dated the 13th June, 1850, made between Isaac Graves, of the Town of Sodus, in the County of Wayne, in the State of New York, to James Filkins, of Yarmouth, of Clinton County, Province of Canada West, yeoman, the memorial purporting to be executed by Isaac Graves in the presence of two persons who were described as of Lewiston, in the State of New York.

The jury, in answer to certain questions submitted to them by the learned Judge, found that the Hiram W. Graves who bought the land was the same person who was the father of the plaintiff, Mrs. Butterfield. 2ndly. That Filkins got possession of the land under the representation

that he was the right owner, when he in fact was not the right owner; and 3rd. That Filkins got possession of the land by fraud, that is, that he knew he was not the rightful owner; and 4th. That when Filkins represented that he had a deed from Isaac Graves, who was the son of Hiram W. Graves, he knew Isaac was not the son of Hiram.

During the progress of the cause Mrs. Butterfield was called as a witness on behalf of the plaintiffs, and was admitted by the learned Judge, although objected to.

Upon the finding the learned Judge recorded the verdict for the plaintiffs, reserving leave to the defendants to move to enter a nonsuit upon the point that the plaintiff's title was extinguished by the operation of the Statute of Limitations.

In Michaelmas Term last *Anderson* obtained a rule *nisi* to enter a nonsuit upon the above ground, or for a new trial, for misdirection in the learned Judge submitting the case to the jury, the plaintiff's evidence shewing that their right was barred, and for reception of Mrs. Butterfield as a witness, and because the verdict was against law and evidence.

In Hilary Term *McGregor* shewed cause, citing *Graham v. Moore*, 4 Serg. & Rawl. 467; *Doe Cuthbertson v. McGillis*, 2 C. P. 124, 150; *Burrows v. Gates*, 8 C. P. 121; *Wright v. Rankin*, 18 Grant 625; *Duchess of Kingston's Case*, 2 Sm. L. C. 6th ed. 680; *Tay. Ev.* 6th ed. 109, *et seq.*; *Foster v. Emmerson*, 5 Grant 135, and 143 per Blake, C.; *Armstrong v. Little*, 20 U. C. 425; *Lord v. Wardle*, 3 B. N. C. 680; *McCance v. London and North Western R. W. Co.*, 7 H. & N. 477, 490.

C. S. Patterson and *Anderson*, contra, cited *Doe Bennet v. Turner*, 9 M. & W. 643; *Asher v. Whitlock*, L. R. 1 Q. B. 1.

GWYNNE, J.—We are of opinion, for the reasons given in other cases in which judgment has been given during this term, that Mrs. Butterfield was not admissible as a witness, but there does not seem to be sufficient to call for this case

being sent back to another jury for the reason alone of her having been, and as we think improperly, admitted to give evidence ; for there is ample evidence upon every point upon which she spoke, wholly independently of her, and her testimony does not in any respect add to the weight of the evidence upon these points. Upon the point whether she was or not the daughter of the said Hiram W. Graves who had bought the land from the Wolvens, she was silent, as indeed she could not well have been otherwise : the evidence upon that point was to be collected by inference from facts spoken to by other witnesses. In fact anything which she said seems to have so little bearing upon the point in contest that we do not think the verdict should be set aside merely upon the ground of her having been examined : if the plaintiff's title is not barred by the operation of the Statute of Limitations I see no reason for sending the case back to another jury ; and if it is barred, then the defendants are entitled to have judgment of nonsuit entered.

The whole point to be determined is involved in the question, when did the right of entry in virtue of which alone the plaintiffs can sustain their action first accrue ? Upon the evidence there seems no room for any other conclusion as to Hiram W. Graves himself, than that he came precisely within the 3rd sub-section of section 2 of 22 Vic., ch. 88. Upon the execution of the deeds to him in 1836 he became a person claiming the land in respect of an estate in possession granted to him by an instrument other than a will, by persons being in respect of the same estate in possession of the land, and no person under such instrument appears ever to have been possession of the land. His right of entry, therefore, first accrued to him upon the instant of his having become entitled to the possession in virtue of the deeds granting the lands to him in fee. Practically it will make no difference if we treat the grantor in the deeds to him as having become his tenants at will upon the execution of the deeds ; for, although Hiram Graves was absent from the Province at the expiration of a year from the commencement of that tenancy, still Hiram and

his heirs, as there is no additional time allowed for a succession of disabilities, would have been barred at the expiration of ten years from the death of Hiram, which event occurred on 24th June, 1850, that is to say would have been barred in June, 1860; and if not barred then, still they would have been barred under the operation of 25 Vic., ch. 20, on the 1st July, 1863, if no action were brought before that day, unless Hiram Graves, or his heir-at-law, has either entered upon the land and obtained actual possession, or unless, without such actual entry, a new tenancy has been created between Hiram Graves, or his heir, as landlord, and the Wolvens, or some person claiming under them, as tenant. There is no pretence for contending that there has been any interruption interposed in the continuous running of the statute unless what occurred upon the occasion of Filkins entering in 1850 caused such interruption, and gave rise to a new right of entry, accrued to the person then entitled to the seisin in fee.

Now, upon the finding of the jury, the nature of Filkin's act we must take to be, that, without the knowledge or authority of Hiram, if he was then living, or of his son and heir Harold, if Hiram was then dead, which seems most probable, Filkins, falsely asserting title to be in himself, as grantee of one Isaac Graves, whom he knowingly and falsely represented to be Hiram's son, and who, as he well knew, was not the owner of the land, procured the Wolvens to give up possession of the land to him, they believing him to be, as he asserted, entitled to the land as the right owner.

The position of the Wolvens at this time was, that they were in peaceable possession of the lands, presumably in law seised in fee, their title being good against all persons except Hiram Graves, or some one claiming lawfully through him. Their seisin was such that it was capable of passing by inheritance, devise, or transfer, and could mature into an indisputable fee simple if Hiram Graves, or some person lawfully claiming through him, should not enter before Hiram and his heirs should be barred

by the operation of the Statute of Limitations, and had Filkins entered upon their possession without their leave, his entry would have been a trespass upon them and not upon Hiram Graves or his heir: *Doe Carter v. Bernard* (13 Q. B. 945); *Asher v. Whitlock* (L. Rep. 1 Q. B. 1); and having obtained possession in the manner that he did, the Wolvens, upon discovering the fraud, might perhaps at any time within twenty years have evicted him and those claiming through him. But the question here is not what rights Filkin's conduct may have given to the Wolvens, but whether it operated so as to give any, and if any, what new rights to Hiram W. Graves, if living, or to his heir, if dead.

Now the act of Filkins obtaining possession in the manner in which he did, cannot be said to have been an actual entry made by or on behalf of Hiram, if living, or of Harold his heir, if dead, so as to place Hiram or his heir Harold in actual possession in fact. The act was not professed to be done on behalf of or for the benefit of Hiram or Harold, but, on the contrary, in assertion of title in Filkins himself, under title derived from Hiram, who, or his heir, consistently with the title asserted, would have no right of entry: Hiram, if living, and Harold, if Hiram was dead, were during their respective lives wholly ignorant of Filkins having had any intention to make the entry, or of its having been made, or so far as appears of the existence of such a person as Filkins. It cannot be said then that in fact the entry of Filkins was an actual entry made by Hiram or Harold. It was contended, however, that it was competent for Hiram or his heir to ratify the act, and that the present plaintiff, Mrs. Butterfield, as heiress-at-law of Hiram and of Harold, has ratified it. But the doctrine of ratification cannot apply: 1st, because Filkins was not professing to act on behalf of Hiram or Harold, or for the benefit of either of them, but on his own behalf, and in his own right, and for his own benefit; and, moreover, if the present plaintiff could ratify the entry of Filkins, as an entry on behalf of her predecessor in estate, her only act

of ratification has been the bringing of the action in 1868, at a time when, unless the interruption in the running of the statute had been caused by some act independently of ratification, the estate of Hiram Graves and his heirs had been extinguished several years prior to the act of ratification relied upon, when therefore the plaintiffs had no estate in the land.

For the same reason that the entry of Filkins cannot be said to have been an actual re-entry by Hiram, if living, or by his heir Harold, if dead, so neither can it be said that the mode of acquiring possession constituted Filkins the tenant, at will or otherwise, to Hiram or Harold, in virtue of any new tenancy then created. There is nothing to bring this case within the principle of *Doe Miller v. Tiffany*, 5 U. C. 79, as an obtaining of possession of the premises by a fraud committed upon persons who then were tenants of Hiram or of Harold, and the effect of that class of cases, if it did apply, would only be to estop Filkins, and those claiming under him, disputing, at the suit of Hiram or his heirs, their right to recover premises, the possession of which had been so acquired, at any time within twenty years from their right of action accruing, without shewing title; but it would not estop Filkins, at the expiration of such twenty years, from insisting that their title had become extinguished, nor would it prevent the statute continuing to run if it was then running: it would be the common case of a person in possession not paying rent, whose acknowledgement of title, while the statute is running, otherwise than in writing within the 15th section of the Act, has no operation to check the course of the statute: *McLaren v. Murphy*, 19 U. C. 612.

Although then the entry of Filkins, effected in the manner in which it was, may have given to the Wolvens rights against him, and although they might have evicted him at any time within twenty years, and although Filkins and those claiming under him could not perhaps have united the possession of the Wolvens to their own, so as to complete a title in them to enable them to recover as plain-

tiffs in ejectment: *Doe Carter v. Bernard*, 13 Q. B. 945; they may nevertheless use the 16th section of the Act which extinguishes the right of recovery by any person after the determination of the time limited by the Act, to make an entry or bring an action, as a shield to defend their possession against the suit of the heir of Hiram W. Graves: *Doe Goody v. Carter*, 9 Q. B. 863.

Inasmuch then as I cannot find any payment of rent by any person to Hiram W. Graves, or his heirs, since the first execution of the deed to him in 1836, nor any entry made by him or his heir upon the lands at any time within twenty-one years after the execution of those deeds; nor any new tenancy created between him or his heirs and any other person subsequently to the expiration of one year from the date of the deeds, nor any acknowledgment of title in writing within the 15th section of the Act, I am of opinion that, notwithstanding the fraud committed by Filkins on the Wolvens, the estate of Hiram Graves and his heirs became extinguished, either upon the 2nd of June, 1856, or on the 24th of June, 1860, being ten years after the death of Hiram, or, at latest, on the first of July, 1863; and that therefore the defendants are entitled to have the non-suit entered, pursuant to the leave reserved. By this decision we give effect to the beneficial object of the statute, which was to prevent the bringing up of dormant titles after many years have been allowed to elapse, and to compel persons who have rights to be vigilant in the enforcement of them within the period prescribed by the statute: *Locke v. Mathews*, 13 C. B. N. S. 753. Here it cannot be said that the conduct of Filkins, however fraudulent, had any effect whatever in causing the parties entitled, to slumber on their right, or in causing them to suppose that they had acquired new rights by his conduct; for, until a recent period, no one interested in right of Hiram Graves would seem to have had any knowledge of the existence of Filkins or of his conduct in the premises.

HAGARTY, C. J.—We have no information whatever as to the position which the Wolven family held towards Hiram Graves, after the absolute conveyances to him, beyond the fact that they remained in possession as before. In their favour, or of any one claiming through them, the statute began to run either at once, or certainly at the end of the first year. If Filkins had entered forcibly on them, or entered simply immediately on their vacating the possession, the plaintiffs could not recover, as the two independent possessions could together shew the plaintiffs to have been out of possession over twenty years. The independent possession of successive trespassers may not avail to establish a right against an actual possession, but they may be used to defeat a claim by the rightful owner seeking to recover after being over twenty years out of possession. It is argued that Filkin's possession cannot be reckoned, as it was obtained by a fraud. But on whom was the alleged fraud practised? If on any one, it was only on the Wolvens, and nothing is claimed here under them. I hardly see how we are to call it a fraud on the plaintiff or her ancestor.

Hiram Graves was apparently still living. How was either he or his heir then injured by the act of Filkins?

Had Filkins represented that he was agent for Hiram or the plaintiffs, and in such character obtained possession, it may be that he could not be heard urging against them that his possession was acquired in his own right. There are several cases in which the effect of a possession obtained by trick or fraud is discussed, such as *Doe Johnson v. Baytup* (3 A. & E. 188).

But I understand that it is as against the persons directly affected or injured by the trick that the principle is adopted.

What Filkins did assert was, that he had bought from a person—not proved even to have existed—who he said was the heir of Hiram, deceased, the latter being still alive, and, if dead, the person named not being his heir.

It would be, I presume, the Wolvens who might recover

a possession thus fraudulently obtained from them. The jury were told here that if possession was delivered to Filkins as claiming under Isaac, the son of Hiram, that is a possession acquired for the person for whom and on whose account it was delivered to him. This, I think, could not help the plaintiffs. They do not claim through Isaac, who never had any title.

I cannot distinguish this case from that of a person coming to land, on which parties were living, without any title, and falsely declaring he had obtained a deed from the patentee, a person well known and supposed to be living abroad. Believing this statement the parties give up possession. A fraud is certainly practised upon them, but apparently on no one besides. As regards the true owner, it is simply a tortious entry on his land.

Had Filkins forcibly ousted the true owner, the statute would certainly begin to run against that title. I cannot see how its operation can be arrested, because Filkins managed to get possession by a trick, not from the true owner but from another occupant without title.

Of course my view is based on the assumption that Hiram Graves's right of entry first accrued either directly on the execution of the conveyance to him, or, at latest, one year thereafter, and that when Filkins entered there is no evidence that Wolven's possession was Grave's possession.

The statute then began to run, and I agree with my brother Gwynne that the plaintiffs have failed to prove anything within the statute to prevent its operation during a period of over twenty years.

The Statute of Limitations (at least in a country like ours) has worked most beneficially for the quieting of titles, and the prevention of litigation. I think the present is hardly a case for extending or straining the well settled legal causes which prevent or suspend its operation. (a)

GALT, J., concurred.

(a) See *Sugden*, Real Property Statute, 98: "This section does not mean the case of a party entering wrongfully into possession; it means a

WHITESIDE V. BELLCHAMBER.

Joint Stock Company—Mortgage of Tolls, &c.—Foreclosure—Action for Tolls, in whose name.

A Harbour and Road Joint-Stock Company, by its Charter (16 Vic., ch. 141), had power to levy Tolls on goods landed or shipped within certain prescribed limits; and the harbour, roads, wharves, and all the real estate, were to be vested in the Company and their successors for ever. The Company, finding it necessary to mortgage the harbour, tolls, &c., did so under authority of their Charter, and the Mortgagee foreclosed the security, entered into possession, and leased to plaintiff, who sued defendant, owner of a wharf within the statutable limits of the harbour, for tolls on goods shipped or landed on defendants' wharf:

Held, That plaintiff could sue only in the corporate name, and a non-suit was therefore directed.

This was an action for Harbour Tolls.

The plea was never indebted, on which issue was joined.

The case was tried, at the last Whitby Assizes, before the Chief Justice of this Court.

The following facts appeared: The Pickering Harbour and Road Joint-Stock Company was incorporated by Stat. 16 Vict., ch. 141, with power to levy specified tolls on goods landed or shipped within certain prescribed limits on the lake shore and harbour, roads, wharves, and all real estate, &c., and the said tolls were to be vested in the company and their successors for ever, who were to have continual succession by the corporate name.

Sec. 17 allowed the Directors, if they found the original capital subscribed not to be sufficient, to borrow money, on the security of the company, by bond, or mortgage of the harbour, road, and tolls, the whole amount borrowed not to exceed £4,000.

case of designed fraud, by which a party, knowing to whom the right belongs, conceals the circumstances giving that right, and by means of such concealment enables himself to enter and hold, citing" *Petre v. Petre*, 1 Drew. 397.

See also, *Darby v. Bosanquet*, 193: "In order to constitute a case of fraud which, in the contemplation of equity, takes a case out of the operation of the Statute of Limitations, it is not sufficient that there should be merely a tortious act, unknown to the injured party, or enjoyment of property without title while the rightful owner is ignorant of his claims: there must be some abuse of a confidential position, some intentional imposition, or some deliberate concealment of facts."

The company borrowed money by mortgage of the harbour, tolls, &c., from one Cameron, and the mortgage was ultimately foreclosed by him, when he entered into possession and leased the premises for a term of years to plaintiff, who now sued defendant, owner of a wharf within the statutable limits of the harbour, for tolls or goods shipped or landed on defendant's wharf.

A verdict was rendered for the plaintiff, with leave reserved to defendant to move to enter a nonsuit, on the ground that the lessee could not sue in his own name.

In Michaelmas term last, *C. S. Patterson* obtained a rule *nisi* on the leave reserved.

This term, *Harrison, Q. C.*, shewed cause, citing *Paris and Dundas Road Co. v. Weeks*, 11, U. C. 56; *Brockville and North Augusta Road Co. v. Trozier*, 14 U. C. 27; *Regina v. Marquis of Salisbury*, 8 A. & E. 716; *Regina v. Caister*, 30 U. C. 247; *Totten v. Halligan*, 13 C. P. 567; *Port Credit &c. Co. v. Jones*, 5 U. C. 144.

C. S. Patterson, contra.

HAGARTY, C. J., delivered the judgment of the Court.

The question is, can the plaintiff maintain this action in his own name?

Totten v. Halligan, 13 C. P. 567, was ejectment by Sheriff's vendee, under a *fi. fa.* lands, against defendant's lessors, the Paris and Ayr Road Company. *Richards, C. J.*, held that sec. 70 of U. C. Consol. ch. 49, "comes in to pass the road and its franchise to the purchaser, and clothes him with all the rights that the company had."

By this section, if any road, bridge, pier, or wharf, be sold by the company, or under legal process, the sales shall be decided to pass them with all rights, privileges, and appurtenances, and subject to all the duties which the law gave or imposed with reference to such road, bridge, pier, or wharf, while same continued the property of the company, &c.

This act professes to be (sec. 3) for the construction along or over any road or other land, a plank, macad-

amized or gravel road, and also any bridges, piers, or wharves connected therewith.

Sec. 1 provides that all companies incorporated for such purposes as are in the Act mentioned under any former Acts, shall continue, notwithstanding the repeal of such Act; and such companies shall be subject to, and may avail themselves of, the provisions of this Act.

U. C. consol., ch. 50, provided for the incorporation of companies generally in certain forms, and sec. 29 enacted that when any pier or wharf, constructed by any Joint-Stock Company, incorporated under the laws of Upper Canada, has been sold or shall be sold thereafter, either by said company or under some powers granted by them, or under legal process against them, the sale should be decreed to pass such piers or wharves to the purchasers, with all the rights, privileges and appointments, and subject to all the duties and obligations which the law gave or imposed with reference to such pier or wharf, whilst same continued the property of the company which constructed same.

By sec. 30, so soon as any such pier, wharf, or harbour is completed to shelter vessels, &c., the company may levy tolls on all goods shipped or landed upon the pier or wharf within the bounds of any such harbour.

Sec. 1 of this Act professes to form companies to construct a pier or wharf, or for dredging, deepening, or making a harbour for the erection of dry dock or marine railway.

I think, in the case of the Pickering Harbour Company, if its special charter be affected by either of these general Acts, it must be by the latter, and not the former; and I am of opinion that the sec. 29 already cited (assuming it to have such application) will not avail to prove plaintiff's contention. It only speaks of piers and wharves, and I think cannot extend its operation to the right to levy tolls on goods landed or shipped, not on or from such piers or wharves, but merely within the original statutable harbour limits.

I am not holding that the general acts *do* apply, but deciding in this language as if they did expressly affect a company specially chartered.

The same year that the special Act incorporated the Pickering harbour, there was a Joint-Stock Companies' Act, 16 Vict., 124, consolidated by the general act already quoted.

Most probably section 29 of the consolidating Acts, by the words "incorporated by the laws of Upper Canada," merely refers to companies formed on the previous general act or acts.

Unless, therefore, the case be specially provided for by legislation, I do not see how either Mr. Cameron, or his lessee, can maintain an action for these tolls, except in the name of the original corporation.

In *Peto v. Welland Railway Co.*, 9 Grant, 455, the plaintiff had obtained judgment and *fi. fa.* lands against the company, and a receiver was granted by *Esten, V. C.* He held that it was quite clear the Sheriff's vendee could not exercise the powers conferred by the Act of incorporation, or, in other words, conduct the railway; and that it was clear the Legislature conferred the powers, especially the power to acquire lands, &c., on the understanding, and with the intent, that these lands should not be diverted or alienated to any other purpose through a proceeding *in invitum* . . . "The creditor's right is to a sale, but a sale is impracticable, owing to the nature of the property. The rents and profits are, however, available without interfering with the purposes of the Legislature, but no machinery exists whereby they may be reached or applied at law."

I do not question the right of the mortgagee to bring ejectment and to obtain possession of the premises, but I am quite unable to understand his right to act as a corporation, and sue in his own, or his lessee's name, for the corporate tolls, not even levied, or due for the use of the actual work of the company.

We had to consider the question of the mortgagee's rights in *Galt v. E. & O. Railroad Co.*, 19 C. P., 358, and many cases are there collected

The subject of mortgage of tolls is fully treated in *Coote on Mortgage*, 195, ch. 12; but in England the power to

borrow, and the remedies of mortgagees, are specially provided for.

The subject is also treated in *Shelford on Railways* (1869), page 99.

No case has been cited in which it was held that a mortgagee could exercise the corporate powers in his own name.

It is unnecessary to discuss here whether the company could or could not be foreclosed, so as to bar for ever their right to hold or resume their property.

No power is given by the Legislature to any one but the company to charge tolls.

These statutable powers to "borrow upon the security of the company, by bond, or mortgage of the harbour, road, and tolls, to be collected thereon," need not be extended to giving them power to confer on a creditor the right, in his own name, to act as a corporation, and in effect to read the act, with all its directions as to the machinery of government, as a charter to "The Pickering Harbour and Road Company," or to any mortgagee thereof by his private name.

The statute, after giving them their name, says, "*and by this name they and their successors shall and may have continual succession, &c.*"

In *Doe Myatt v. St. Helen Railway Co.*, 2 Q. B., 374, Coleridge, J., says, speaking of a mortgage of "the undertaking, rates and tolls," it being urged that these words included the land, &c.: "If that construction be right, the instrument gives the mortgagee power, if he takes possession, to put an end to the undertaking, since the power of taking tolls will cease, the mortgagee having no power to levy tolls. That is a very monstrous and improbable supposition. The Act contemplates a repayment of the money borrowed on mortgage, consistently with and by means of a carrying on of the undertaking by the same hands."

See also the case there cited *Pontet v. Basingstoke Canal Co.*, 3 Bing. N. C., 433, and the remarks of *Tindal, C. J.*

By sec. 2 of this act "*the company*" shall have full power, &c., to demand tolls. No power is conferred upon any other.

I am strongly inclined to think that no greater power existed in this company to grant a mortgage than the St. Helen's company had, according to Sir John Coleridge.

I think the rule should be absolute to enter a nonsuit.

Rule absolute to enter nonsuit.

REGINA V. MASON.

Criminal law—Larceny of Police Court information—Maliciously destroying same—Patent defect in indictment—Arrest of judgment after verdict—Reversal in Error—Police Court a Court of Justice within 32 & 33 Vic., ch. 21, sec. 18—Reservation of this question at Nisi Prius—C. S. U. C., ch. 112, sec. 1—Count for felony, with allegations of previous convictions for misdemeanour—Misjoinder of counts.

Held, that the Police Court of the city of Toronto is a Court of Justice within 32 & 33 Vic., ch. 21, sec. 18, and that the prisoner was properly convicted of stealing an information laid in that Court.

Held, also, that maliciously destroying an information or record of the said Court is felony within the same Act.

Held, also, that the Court will not arrest judgment after verdict, or reverse judgment in Error, for any defect patent on the face of the indictment, as by 32 & 33 Vic., ch. 29, sec. 32, objection to such defect must be taken by demurrer, or by motion to quash the indictment.

Whether the Police Court is a Court of Justice within 32 & 33 Vic., ch. 21, sec. 18, or not, is a question of law which may be reserved by the Judge at the trial, under Consol. Stat. U. C., ch. 112, sec. 1, and where it does not appear by the record in Error that the Judge refused to reserve such question it cannot be considered upon a writ of Error.

Where an indictment contains one count for larceny, and allegations in the nature of counts for previous convictions for misdemeanors, and the prisoner, being arraigned on the whole indictment, pleads "not guilty," and is tried at a subsequent assize, when the count for larceny only is read to the jury, *Held*, no error, as the prisoner was only given in charge on the larceny count.

It is not a misjoinder of counts to add allegations of a previous conviction for misdemeanor, as counts, to a count for larceny, and the question, at all events, can only be raised by demurrer, on motion to quash the indictment under 32 & 33 Vic., ch. 29, sec. 32; and where there has been a demurrer to such allegations, as insufficient in law, and judgment in favour of the prisoner, but he is convicted on the felony count, the Court of Error will not reopen the matter on the suggestion that there is misjoinder of counts.

An indictment describing an offence within 32 & 33 Vic., ch. 21, sec. 18, as feloniously stealing an information taken in a Police Court, is sufficient after verdict.

ERROR upon two judgments, entered upon convictions found at the Court of Oyer and Terminer and General Gaol Delivery, held at Toronto in January last.

The prisoner was tried, before the Chief Justice of this Court, under one indictment, which had been preferred at a previous assize, charging him with having stolen an information laid by one Julia Minor, before the Police Magistrate of the city of Toronto, against one Vincent. The indictment also contained several other presentments of previous convictions for misdemeanor.

The venire for the jury was to enquire "upon their oaths whether the said George Albert Mason be guilty of the larceny above specified or not."

The prisoner, who was undefended by counsel, upon the indictment being read, pleaded not guilty.

The jury rendered a verdict of guilty, which was recorded thus, that "the said George Albert Mason is guilty of the premises aforesaid in the first count of the indictment on him above charged."

The prisoner then urged, in arrest of judgment, that the Police Court was not a Court of Record, nor alleged so to be, and that the information and depositions mentioned in the indictment were not records or original documents within the statute. To this the Attorney-General answered, that the prisoner should not be allowed to urge such objections, because the information and deposition were original documents, and also because by 32 Vic., ch. 29, every objection to any indictment, for any defect apparent on the face thereof, should be taken by demurrer, or on motion to quash, before defendant had pleaded, and not afterwards, and that no motion in arrest of judgment should be allowed for any defect in the indictment which might have been taken advantage of by demurrer, or amended under said Act. The prisoner replied that the answer of the Attorney-General was insufficient in law, but the Court considered it sufficient, and sentenced the prisoner to two years imprisonment in the penitentiary.

The assignment of errors, in substance, was : 1st, That,

notwithstanding the statute, the prisoner had the right to urge these matters in arrest of judgment; 2nd, That no offence was disclosed; 3rd, That the Police Court was not a Court within the statute, and the information was not a record of any such Court; 4th, That the indictment shewed no offence committed after a previous conviction &c., for which a greater punishment was given, so as to make proper the allegations of previous convictions; 5th, That the substance and effect of the indictable misdemeanors were not stated; 6th, That the information was not such a proceeding as was named in the statute, nor was it stated to be an original document.

The Crown joined in error.

Besides the errors assigned, *Harrison*, Q.C., urged another ground, that the prisoner was arraigned and afterwards given in charge on the whole indictment; in effect, that the statement of the previous convictions was improperly read to the jury.

The second indictment contained two counts, the first charging the prisoner with having feloniously stolen an information and deposition, the same being a record of the Police Court of the city of Toronto; and the second, with feloniously, unlawfully, and maliciously destroying the same information and deposition, before then feloniously stolen, contrary to the form of the statute in that behalf, viz., 32 & 33 Vic., ch. 21, sec. 18.

Besides these two counts, the indictment contained statements of previous convictions, as in the first indictment.

The prisoner pleaded not guilty.

The trial took place before Wilson, J., when the prisoner was convicted on the second count, but acquitted on the first. The prisoner, by his counsel, then demurred to the remainder of the indictment, as insufficient in law, and, after argument, judgment was given in his favour.

On his being brought up for sentence, the same grounds were urged in arrest of judgment as in the first case, and

with the same result. The assignments of error were also the same.

Harrison, Q.C., for the prisoner, cited *Bage v. Bromwell*, 3 Lev. 99; *Nash v. The Queen*, 4 B. & S. 935; *Regina v. Summers*, 19 L. T. N. S. 799; *Regina v. Garland*, 11 Cox. 225; *Regina v. Cox*, 10 Cox, 502; *Regina v. Cleworth*, 9 L. T. N. S. 682.

K. McKenzie, Q.C., contra, cited *Regina v. Ferguson*, 1 Dears. C. C., 427; *Burns's Justice*, III., 107.

HAGARTY, C. J., (speaking of the first indictment).—Even if it be open to counsel to raise the question raised for the first time by Mr. Harrison on the argument, I am of opinion that it cannot avail. Reliance was placed on a case in Ireland, *Regina v. Fox* (10 Cox, 502). But there it appeared that prisoner was given in charge to the jury to enquire “whether she be guilty of the premises in said indictment, or any part thereof.” In our case, the prisoner was given in charge “whether he be guilty of the larceny, in the indictment specified, or not.”

If we could gather from the writ of error before us that, although correctly given in charge to the jury, yet that on previous arraignment the prisoner had been required to answer the whole indictment, we should long pause before giving effect to such an objection, when he was rightly given in charge to the jury of trial. In the present case, it would be especially improper to give way to the objection, as the indictment was found, and the prisoner arraigned and pleaded, at a previous Court of Assize, and could not in any way have been prejudiced by any mistake in his arraignment.

It is also objected that there is a misjoinder of counts. This is based, I presume, on the idea that this indictment contained more than one count. It is wrong, we think, to apply the term “count” to these allegations of previous convictions. As is said by Blackburn, J., in *Latham v. The Queen* (5 B. & S. 643), “each count is in fact and theory a

separate indictment;" and if there be no express finding on any one, it would seem there may be a *venire de novo* thereon.

In the case before us, there was no evidence offered, and no finding on anything in the indictment except the first count for larceny. If we treat the allegations of the previous convictions as counts, it is clear, on the express authority of the last case cited, and also on a case ten years earlier, of *Regina v. Ferguson* (1 Dearsly, 427), that the objection is untenable.

We consider it unnecessary to discuss the propriety of their appearance in the record, as we find the prisoner was not given in charge or tried upon them, and no finding in respect thereof.

The main point of objection is the alleged insufficiency of the indictment. Our statute seems express that, in a case like the present, where the objection (if any) is patent on the face of the indictment, the prisoner must demur, or move to quash: "No motion in arrest of judgment shall be allowed for any defect in the indictment which might have been taken advantage of by demurrer, or amended under the authority of this Act." These words are added to those used in the Imperial Act. We therefore consider the learned Judge rightly held the answer of the Crown sufficient on the motion to arrest judgment.

If there be any meaning in the language used by the Legislature, we must hold that parties must demur to, or move to quash the indictment for any patent defect; and if not demurred to, such objection shall not be available in arrest of judgment. If the Court overrule the demurrer, the judgment is not conclusive, but can of course be carried further. The object seems to be to prevent waste of time and labour in criminal trials, and to compel a legal defence to be resorted to at the earliest possible stage.

The same statute (sec. 80) declares that "no writ of error shall be allowed in any criminal case, unless it be founded on some question of law which could not have been reserved, or which the Judge presiding at the trial

refused to reserve for the consideration of the Court having jurisdiction in such cases." The right to reserve a case is under Consol. Stat. U. C., ch. 112, whereby the Judge may in his discretion reserve "any question of law which arose on the trial."

I am at present under the impression that at the trial of this case, if a question arose whether the "Police Court" was a Court, or the "information" mentioned in the indictment a document, within the meaning of the statute, the presiding Judge could have reserved the question under the statute. It does not appear that he was asked, or refused so to do. If the objection had been suggested that it was necessary to describe such a paper as an original document belonging to said Police Court, I think the Court could, on the evidence that it really was such a document, order the indictment to be amended by inserting such words.

If this view be correct, all alleged errors could have been either cured at the trial or would come up before the Court on demurrer; and in such a view the writ of error should not be allowed.

If the objections be properly before us, we could, I think, have no hesitation in deciding against the plaintiff in error. Our statute (sec. 18) makes it felony in any one who "steals, or for any fraudulent purpose takes from its place of deposit for the time being, or from any person having the custody thereof, &c., any record, writ, return, panel, process, interrogatory, deposition, rule, order, or warrant of attorney, or any original document, whatsoever, of, or belonging to any Court of Record or other Court of Justice, or relating to any matter civil or criminal, begun, depending, or terminated in any such Court, or any bill, &c., in equity, &c., or of any original document in any wise relating to the business of any office or employment under Her Majesty, and being or remaining in any office appertaining to any Court of Justice, or in any Government or public office."

We are asked to confine this to the documents of Courts of Record. We are satisfied that we have no right so to

do. The words used are very comprehensive, and include in terms all Courts of Justice. The Police Court, established by statute, must fall within this description. This seems too clear for argument.

The indictment charges the stealing "a certain information made and subscribed by one J. M., against one J. V., at the Police Court of the said city, such Court being a Court of Justice in the Province of Ontario, from one J. N., clerk of the said Court, then having the lawful custody of the same." We think these words, at all events after verdict, sufficiently charge the stealing of an original document belonging to the Court.

The word "information" is not one of the words used specifically in the Act, which speaks of "depositions" and "affidavit," and then, "or any original document whatsoever, of, or belonging to any Court of Record or other Court of Justice, or relating to any matter, &c., depending in such Court."

We know, judicially, that the word "information" bears the meaning of a statement or deposition on oath, and, if so, that it imports that it is an original document, and that the proof would necessarily have failed if it shewed the abstraction of any piece of paper not falling within the statutable definition. The addition of the words, "the same being an original document belonging to the said Court," would have removed all difficulty.

As is said by Blackburn, J., in *Nash v. The Queen* (4 B. & S. 940), "After a verdict of guilty rendered, we must take it that the jury found all necessary to establish the offence, one or more, charged in this count, and we must suppose that the Judge told them what parts of it were material and what not."

We are of opinion that judgment must be for the Crown.

GWYNNE, J.—Nothing can be more informal and imperfect than the manner in which the proceedings in these cases have been entered upon the record of those proceedings as furnished to us. When we extract, as best we can,

the material part, and examine the alleged errors, which have been assigned, our judgment must be for the Crown.

[After stating the contents of the second indictment, the learned Judge continued:]

These were the only counts in the indictment charging any substantive criminal offences to be tried; but the indictment contained *statements* of the prisoner having been previously convicted upon three several occasions of misdemeanours, which statements, if the prisoner should be found guilty of the substantive felonies charged, or of either of them, would have been matter proper to be inquired into, if the misdemeanors had been stated to have been within the 18th section of 32 & 33 Vic., ch. 21, namely, misdemeanors punishable under that Act. The substance of the indictment and convictions was not stated, as required by the 26th section of 32 & 33 Vic., ch. 29. If the noncompliance with the provisions of this statute, as to the mode of *proceeding* upon an indictment for an offence committed after a previous conviction, could constitute error, I see no reason for presuming that, nor would we be justified in presuming that, those provisions were not complied with; on the contrary, I think it sufficiently appears that they were complied with. Those provisions are, that the offender shall, in the first instance, be arraigned upon so much only of the indictment as charges the subsequent offence, and if he pleads not guilty, the jury shall be charged, in the first instance, to inquire concerning such subsequent offence only, and if they find him guilty, he shall then, and not before, be asked whether he was so previously convicted as alleged; but if he denies that he was so previously convicted, or stands mute, the jury shall then be charged to inquire concerning such previous conviction. Now with this latter inquiry the jury in this case were never charged, because it appears that, upon their rendering their verdict that the prisoner was guilty of the felony charged in the second count, but was not guilty of the felony charged in the first count, the prisoner, by his counsel, demurred in law,

(as appears by the record thereof endorsed on the indictment) *to the remainder of the said indictment.*

Whether this proceeding by way of demurrer was at all necessary, and whether the prisoner could not have had the same benefit precisely, if, when asked if it be true he had been previously convicted as alleged in that behalf, he had without any formal demurrer pointed out that the statement did not allege or shew that the misdemeanors referred to, or any of them, had been for misdemeanors within 32 & 33 Vic., ch. 21, is a matter now of no moment. But the course which was taken, whether necessary or unnecessary, and whether or not the strictly proper course to have been pursued, seems conclusively to shew that the provisions of the Statute were strictly complied with, and that what the prisoner had pleaded not guilty unto were the *offences charged* in the indictment, and which alone were given in charge to the jury, and that, as to the statements of previous convictions, no reference was made to them until after the jury had rendered their verdict upon the offences charged, when the prisoner objected to any inquiry as to previous convictions, as above stated.

[Proceeding to consider the errors assigned, the learned Judge said :]

As to the second and third of these objections, we are all of opinion that the Police Court, in the second count mentioned, is a Court of Justice within the 18th section of the 32 & 33 Vic., ch. 21, and that an information or deposition made and used in that Court, is a document of or belonging to such Court, whether it be a record or not, the stealing or destruction of which is made felony within that section. The term deposition is expressly used in the Statute and the indictment; and what is alleged in the first count to have been stolen, and in the second to have been destroyed, is one document, namely, "a certain information and deposition," which we take to be a sufficiently certain allegation that the document referred to was an information upon oath, that is, was a deposition within the meaning of the Act.

The fifth objection is an attempt to open again the matter already concluded by the judgment of the Court of Oyer and Terminer, and so concluded in the prisoner's favor, and which therefore he was not required to answer, and in respect of which the jury who tried him were never charged. Attributing to these statements of previous convictions the character of separate counts (although we do not think, strictly speaking, they are counts, but merely statements appended to the counts which charge the criminal offences to be tried), it is no objection, which can be taken upon error, that a verdict has been rendered upon one count in an indictment charging felony, and no verdict taken or rendered on another. Nor is there error in such case, although that other be a count charging a misdemeanor: it is the same as if the indictment contained the single count upon which the conviction was made: *Regina v. Ferguson* (1 Dearsly, 427). But, treating the statements of previous convictions to be not counts, but merely statements made for the purpose of founding an inquiry to be entered into only in the event of the prisoner being found guilty of the *offence charged* in the indictment; when it appears that they were not enquired into at all, and that the jury was not charged with them, and that they were in substance so effectually removed from the indictment that the prisoner was in no way prejudiced by their insertion, I cannot understand upon what principle he can now be heard to contend that there was error in their insertion.

Then as to the fourth objection.

What is insisted upon is, that the alleging the previous convictions for misdemeanor at all, made the indictment bad; and in support of this contention we were referred to *Regina v. Summers* (19 L. T. N. S. 799, also reported in L. Rep. 1 C. Cas. Reserved, 182), *Regina v. Fox* (10 Cox, 502), and *Regina v. Garland* (11 Cox, 225, and 3 I. C. L. 383). These were cases of indictments for misdemeanors, in which were either alleged previous convictions for felony, or, without being alleged, proof was offered of a previous conviction

for felony under Imperial Act 27 & 28 Vic., ch. 47, sec. 2. These cases have no bearing upon the present case, for this is not the case of an indictment for misdemeanor, containing a statement of a previous conviction for felony, which in those cases it was said no statute authorized, but an indictment for felony under 32 & 33 Vic., ch. 21, containing statements of previous convictions for misdemeanors, which the Statute *does* authorize, if the previous convictions were for misdemeanors indictable under the same Act; and all that is wrong is that the previous convictions are not stated with the preciseness required by 32 & 33 Vic., ch. 29, sec. 26. Whether or not it be error, according to the law of England, in an indictment for misdemeanor, to state a previous conviction for felony, although the Statute 27 & 28 Vic. ch. 47, allows it to be proved, and when proved imposes for that reason a heavier punishment, is a point with which we need not at present concern ourselves, for not only is this case a wholly different case, but our law as to what may or may not be objected on error, essentially differs from that of England. By our Act 32 & 33 Vic., ch. 29, sec. 32, it is enacted that "*every* objection to any indictment for *any* defect apparent on the face thereof, must be taken by demurrer, or motion to quash the indictment before the defendant has pleaded, *and not afterwards*; and every Court, before which any such objection is taken, may, if it be thought necessary, cause the indictment to be forthwith amended in such particular by some officer of the Court, or other person, and thereupon the trial shall proceed as if no such defect had appeared, *and no motion in arrest of judgment shall be allowed for any defect in the indictment which might have been taken advantage of by demurrer, or amended under the authority of this Act.*" And by section 80, it is enacted that no writ of error shall be allowed in any criminal case, unless it be founded on some question of law which could not have been reserved, or which the Judge presiding at the trial refused to reserve for the consideration of the Court having jurisdiction in such cases. Now

the defective statement of the previous convictions for misdemeanor was not a matter which could have avoided the whole indictment; but if it could have had that effect the point could have been raised by demurrer. Upon the objection being made to the defective statement of these convictions, what was done was equivalent to erasing them from the indictment, and the conviction stands upon the counts whereof the prisoner was convicted, unaffected in any manner by the defective statements; and if it were for no other reason than that they were so in effect removed from the indictment, the prisoner could not insist that they are still upon the indictment for the purpose of error.

As to the objection which was moved in arrest of judgment, that was also a point which could have been, and therefore should have been, raised by demurrer, if there was thought to be any thing in it, and not having been so raised, cannot now be entertained. The intention of the Legislature was, we have no doubt, to prevent, after a trial upon the merits and a verdict of guilty, the cause of justice being delayed by such objections as have been raised in this case. But we are also of opinion that there is nothing in the point raised, even if it had been raised by demurrer instead of by motion in arrest of judgment, and that what is good as against a demurrer cannot be bad in arrest of judgment, or on error, if error lay, and we are of opinion it does not lie in this case. Judgment, therefore, will be for the Crown.

GALT, J., concurred.

Judgment for the Crown.

PALMER V. McLENNAN.

Account stated—Evidence of—Promissory Note—Stamps.

Held, that an instrument in this form, "Good to Mr. Palmer for \$850 on demand," was not a promissory note, and so requiring a stamp, but that (Gwynne, J., dissenting), in the absence of any explanation of the circumstances under which it was given, it was *prima facie* evidence to go to a jury of an account stated.

THIS was an action against the defendants, as executors of Duncan McLennan, executor of Donald Campbell. The declaration was for money payable to defendants, as executors to plaintiff; for money lent by plaintiff to Donald Campbell; money paid; money received by D. Campbell, for plaintiff; interest; and for money found to be due from D. Campbell to plaintiff, on accounts stated between them.

Pleas, never indebted, payment by D. Campbell, and payment by D. McLennan.

The case was tried at Ottawa, before A. Richards, Q. C. sitting for the Chief Justice.

The plaintiff produced the following document, admitted, to be signed by Donald Campbell:

"Good to Mr. Palmer, for eight hundred and fifty dollars, on demand. 10th November, 1866.

D. CAMPBELL."

No other evidence was offered.

For defendant it was objected that this document was a promissory note, and required a stamp: 2. That there was no evidence of an account stated, or of any previous dealing between the parties: 3. That it was not an account stated between plaintiff and defendants, there being no privity between them.

A verdict was entered for plaintiff, with leave to defendants to move to enter a nonsuit.

In Michaelmas term last *Harrison*, Q. C., obtained a rule on the leave reserved, to which *S. Richards*, Q. C., shewed cause, citing *Horne v. Redfearn*, 4 B. N. C. 433;

Sibree v. Tripp, 15 M. & W. 23; *Tyke v. Cosford*, 14 C. P. 64.

Harrison, Q. C., contra, cited *Toms v. Sills*, 29 U. C. 497; *Ellis v. Mason*, 7 Dowl. 598; *Brooks v. Elkins*, 2 M. & W. 74; *Wheatley v. Williams*, 1 M. & W. 533; *Green v. Davis*, 4 B. & C. 235; *Walker v. Roberts*, C. & M. 590; *Ritchie v. Prout*, 16 C. P. 426; *Byles' Bills*, (ed. 1866) 11.

HAGARTY, C. J.—The case presented at the trial was certainly not free from suspicion. The memorandum is dated November, 1866. The action is brought in July, 1871, nearly five years after, and against a second set of executors. The first question to be considered is the plaintiff's right to recover by the simple production of this instrument. It is either an admission of an existing debt to support an account stated, or it is a promissory note. If the latter, the objection as to the want of a stamp must prevail.

"In order to constitute an account stated, there must be a statement of some certain amount of money being due, which must be made either to the party himself or to some agent of his"—per Parke, B., in *Hughes v. Thorpe*, 5 M. & W. 667.

There is no doubt that in the paper in evidence there is a statement of a specific amount, and the document declares that it is "good to plaintiff for that amount, on demand."

It is not easy to find any legal definition of the word "good." It is not so specific as an "I. O. U.," which seems to have acquired a definite meaning as an admission of a debt. My brother Wilson somewhat discusses the point in *Tyke v. Cosford*, 14 C. P. 68. He says, "The words are, 'good to T. T. (the plaintiff) to the amount of \$300, to be paid to him.' This seems to be an express declaration or acknowledgment of debt for whatever 'good' may mean, 'to be paid,' must surely mean something. Suppose 'good' had not been there at all, but the instrument

had been merely, 'the amount of \$300 to be paid to T. T.,' it can scarcely be doubted that this would have been as strong and as direct an acknowledgment as could well have been made of a debt against the person making it. He thinks this the same as "I. O. T. T. \$300." He adds, "A plain I. O. U. so much money is evidence of an account stated, but with the words 'to be paid' it becomes a promissory note," referring to *Brooks v. Elkins*, 2 M. & W. 74; *Waithman v. Elsee*, 1 C. & K. 35. Again, he says he inclines to hold that the word "good" would have amounted to an acknowledgment sufficient to sustain an account stated, if payable in money. "As 'I owe you' is an acknowledgment, 'due to you' should be so too, and it is so according to the cases in *Hump. Rep.* Why not also 'good to you?'"

My own strong impression is, that "good" in this instrument must be considered as equivalent to "due," and that no rational distinction can be drawn between them. If the document mean any thing it must be, in substance, to import that it is to be considered as declaring to the plaintiff that on demand he is entitled to \$850 from the person signing it; that it is to be good to him to enable him to demand such sum from the signer.

Brown v. Gilman, 13 Mass. 158, was a case of a memorandum signed, "Good for \$126 on demand," signed by defendant. It was decided that a holder, who could not prove it was given to him, could not recover. No question is raised as to the effect of the word "good." Parker, C. J., says: "On a count for money lent, money had and received, &c., it would be conclusive evidence of so much due, unless the party signing it should prove it was given with a different intent. The present plaintiff must shew it was given to him."

In *Franklin v. March*, 6 New Hamp. 364, "Good to R. B. or order, for \$30, borrowed money," was held a good promissory note. Parke, J., says, "Good to R. C. or order" is equivalent to a promise to pay R. C. or order."

I do not refer to these American cases for any other pur-

pose than to shew the common understanding as to the term "good." It is, I think, a word of well known popular meaning. A "bon" is, I presume, its equivalent, and is also a word very well known. In fact, I think, in this country, it is a word used instead of the "I. O. U." of known old country significance. Assuming it to bear the same meaning as the common I. O. U., we have to consider its effect in evidence without any explanation of the circumstances under which it is given. By itself I think it sufficiently imports a consideration. The case cited of *Tyke v. Cosford* bears on that point, and is supported by *Davies v. Wilkinson*, 10 A. & E. 98.

There is no doubt that it is always open to defendant to rebut any inference to be raised by the production of such an instrument; and if in fact no debt be due or account stated, the document goes for nothing. In support of this view may be cited *Lemere v. Elliot*, 6 H. & N. 658, where the late Chief Baron says, "An I. O. U. professes to be the result of an account stated in respect of a *debt due*, and it is important not to make fiction supply the place of truth and say that an account has been stated in respect of a debt where in reality there was none."

A late case in our Queen's Bench, *Toms v. Sills*, 29 U. C. 498, is also in point. The evidence shewed there was no debt due. The plaintiff, as attorney for V., had a bill of costs against the defendant, who had been sued by V. He paid part of the bill, and wrote at the foot, "I will pay the above balance in a week." He owed nothing to his opponent's attorney, and on this evidence the Court, in appeal, properly held there could not be a recovery on an account stated. But in the absence of any contradictions or explanations of the circumstances under which it was given, I am of opinion that it is *prima facie* evidence to go to a jury of an account stated and settled between the parties.

In *Fessenmayer v. Adcock*, 16 M. & W. 449, Parke, B., says, "In *Curtis v. Rickards*, 1 M. & Gr. 46, the production by the plaintiff of the I. O. U. was held *prima facie*

evidence that an account had been stated by the defendant with him, though no name was mentioned in the instrument, that is of a payee. I agree with that decision."

In *Lubbock v. Tribe*, 3 M. & W. 613, Lord Abinger says, "Where there is a promise to pay a sum of money as due from A. B., it is evidence of an account stated, which means this, that the simple promise, if it stand unexplained and uncontradicted, is evidence to go to a jury that the plaintiff claim that sum to be due, and that there are matters of account between the parties."

In *Porter v. Cooper*, 1 C. M. & R. 394 Parke, B., says, "If there is an admission of a sum of money being due, for which an action would lie, that will be evidence to go to a jury on the count for an account stated." Alderson, B., to same effect.

It remains to consider the objection as to the want of a stamp. Our Stamp Act gives us no definition of a promissory note, and is much more meagre in this respect than the Imperial Statutes. It merely declares that every promissory note, draft, or bill of exchange, shall require stamps. Sec. 3 does not help us further.

The English authorities seem to hold that an "I. O. U." simply does not require a stamp.

In *Melanotte v. Teasdale*, 13 M. & W. 216, Pollock, C. B., says: "The doctrine that an I. O. U. simply does not require a stamp, has been so long established, and so many instruments have been drawn on the faith of it, that it must be considered settled law." In that case the addition of the words, "which I borrowed of M." (the deceased), was held to carry the case no further than a mere acknowledgement. There were also the words, "to pay her 5 per cent. till paid." He says these words were mere surplusage, and that the only agreement of which the paper was evidence, is an agreement to pay interest on the £45, which is not necessarily of the value of £20. This is to shew that it did not require an *agreement* stamp.

Byles on Bills (1866), 11: "If there be no words amounting to a promise, the instrument is merely evidence

of a debt, and may be received as such between the original parties. Such is the common memorandum, I. O. U."

Smith v. Smith, 1 F. & F. 539.—On the authority of the last case cited, Byles, J., held the following not to require a stamp: "This is to certify that I owe £210 to A. B. I promise to pay interest at five per cent," the promise only referring to the interest. See also *Taylor v. Steele*, 16 M. & W. 665; *Bayley on Bills* (1849), and cases there collected, page 3.

In the case before us it is brought down to the point whether the introduction of the words "on demand" makes the instrument a note. I have examined a great many cases, and can find none exactly similar. If the words were, "*to be paid on demand*," according to my brother Wilson's view, in *Tyke v. Cosford*, it becomes a promissory note. He adds, "the words 'to be paid' have some meaning, and that is that they create an express promise." He cites *Brooks v. Elkins*, 2 M. & W. 74; *Waithman v. Elsee*, 1 C. & K. 35. The first of these cases was, "I. O. U. £20, to be paid on 22nd instant." The Court held it to be either a promissory note or an agreement for payment of money, and in either case it requires a stamp. The latter case is a *Nisi Prius* decision of Rolfe, B., and is to same effect. Are we then, in the absence of direct authority, to carry the decisions further, and hold the words "on demand" to import a promise to pay? The addition of the words, in the case before us, is mere surplusage, and has no effect on the operation of the instrument. An action would lie five minutes after its execution, without the aid of the words. A note specifying no time of payment is payable on demand.

In *Sibree v. Trip*, 15 M. & W. 23, the following was held not to be a note:—"Bristol, August 14, 1843. Mem.—Mr. S. has this day deposited with me £500, on the sale of £10,300 £3 per cent. Spanish, to be returned on demand." Signed by defendant. Pollock, C. B., says, "It is difficult to lay down a rule which shall be applicable to all cases, but it seems to me that a promissory note, whether referred to in the Statute of Anne or in the text books,

means something which the parties *intend* to be a promissory note. We cannot suppose the Legislature intended to prevent parties from making written contracts relating to the payment of money, other than bills and notes."

In *Taylor v. Steele* (1847), 16 M. & W. 667, Parke, B., says: "The more recent cases say that implication is not enough, but there must be a positive engagement to pay * * I agree that an actual promise is not necessary, if there are words in the instrument from which a promise to pay can be collected." In that case the Court held that an instrument to this effect, after the date, "Received from A. B. the sum of £170, for value received, for which I promise to pay her at the rate of £5 per cent. from above date," was *not* a promissory note.

Story on Notes, sec. 14: "There must be an express promise upon the face of the instrument to pay the money; a mere promise implied by law upon an acknowledged indebtedment will not be sufficient."

I am wholly disinclined to carry the law any further than it has heretofore gone, and I therefore hold that this is not a promissory note requiring a stamp.

GWYNNE, J.—If this were a case wholly of the first impression I should be disposed to hold, as it appears would be held in some of the Courts in the United States, that the instrument produced in evidence here is a promissory note. The words "Good to Mr. Palmer for \$850 on demand," seem to me to convey a declaration by the person signing, that the instrument should be of the worth or value to Mr. Palmer of the sum named on demand, and to import a promise to pay, and so to make good the declaration in the only way it could be effectually made good; but I agree that, upon the strength of the English decisions in respect of the well-known instruments called I. O. U., I am concluded from so holding, and so from giving that effect to the instrument which its tenor leads me to think the parties thereto contemplated it should have. Being so concluded, I find a great difficulty in holding that this

instrument upon its face, without further evidence, imports (as an "I. O. U. \$850 on demand," delivered to Mr. Palmer, or "due to Mr. Palmer \$850 on demand," plainly would *express*) a distinct unqualified absolute admission of a debt due by the party signing it.

The expression is not to be found in any of our Reports or Text-Books, nor in any Dictionary of Law Terms, nor yet in any Dictionary of the English Language. It occurs in *Tyke v. Cosford* (14 C. P. 64), in connection with the words "to be paid to him," which were held to involve a promise to pay; but I have been unable to find any authority to the effect that the words "*good to A. B.*" for a sum of money on demand, have in England any recognition as a term of legal science having a defined meaning attached to them. Left to the guidance of my own judgment, unaided by authority, I am bound to say that I cannot see in such an expression any such distinct, unqualified admission of a debt due from the party signing to the party named in the document, as is indispensably necessary to render it admissible as evidence of an account stated. To my mind it conveys no more an admission of an original liability than it does an admission of money lent, or of money had and received, so as to render it admissible under those counts; but I apprehend there is no doubt that it affords no evidence whatever of money lent. Upon the whole I have been unable to bring my mind to concur in holding, without more evidence of the circumstances under which it was given, that it is evidence of an account stated; and I think, as the plaintiff, who is the only person upon this record who may reasonably be supposed capable of supplying the evidence, has abstained from offering any, of the circumstances under which it was given, and consented to a nonsuit being entered, if the mere production of the document was insufficient to entitle him to recover, that a nonsuit should be entered, unless he desires a new trial to enable him to supply the required evidence.

GALT, J., concurred with HAGARTY, C. J.

Rule discharged.

TARIFF OF FEES,
MADE BY THE
JUDGES OF THE SUPERIOR COURTS
OF COMMON LAW.

MICHAELMAS TERM, 1871.

(35th Victoria.)

December 9th, 1871.—The following Rule was read in Court :—

FROM and after the first day of Hilary Term next, the Table of Costs following shall be that according to which all costs in civil actions in the Courts of Queen's Bench and Common Pleas, shall be allowed and taxed, and no other fees, costs, or charges, than herein set down shall be allowed, in respect of the matters thereby provided for, either upon taxation between Attorney and Client, or between Party and Party.

TABLE OF COSTS.

General allowance for Plaintiffs and Defendants, as well between Attorney and Client, as between Party and Party, approved by Rule of Court, Michaelmas Term, 35th Victoria, November, 1871.

TO THE ATTORNEY.

Instructions to the Attorney :—

	\$	cts.
Taking Instructions to Sue or Defend, except in		
Ejectment	3	00
In Ejectment.....	4	00

WRITS.

	\$	cts
Summons including attendance	2	00
Concurrent Summons	1	50
Renewed Summons	1	50
Capias.....	2	00
Concurrent Capias.....	1	50
Renewed Capias	1	50
Capias ad Satisfaciendum.....	2	00
Renewed Capias ad Satisfaciendum	1	50
Capias ad Satisfaciendum for the Residue.....	2	00
Renewed do. do.	1	50
Fieri Facias	2	00
Renewed Fieri Facias	1	50
Concurrent Fieri Facias	1	50
Fieri Facias for the Residue.....	2	00
Renewed do.	1	50
Habere Facias Possessionem.....	2	00
Special endorsement of demand on Writ of Summons	1	00
Writ of Revivor.....	2	00
Ejectment (Summons in)	2	00
Writ of Trial, drawing, if under Seven Folios	1	25
(If above, 10 cents per folio for all above.)		
Writ of Enquiry the same		
Subpoena ad Testificandum	1	00
Subpoena, Duces Tecum	1	25
(and if above four folios, additional, per folio 10 cents)		
Attachment against Goods of absconding debtor ...	2	00
Attachment against Garnishee.....	2	00
Habeas Corpus obtained by plaintiff, including allowance thereof	2	00
Procedendo.....	2	00
Venditioni Exponas	2	00
Supersedeas	1	25
Mandamus.....	2	00
Injunction	2	00
Commission to examine witnesses.....	2	00

NOTE.—The above allowances include all charges for attendance for the writ and delivering it to the officer.

COPY AND SERVICE OF WRITS OF SUMMONS AND OTHER PROCESS.

	\$ cts.
For each copy, including copies of all Notices required to be endorsed	1 00
Service of each copy of Writ, if not done by the Sheriff, or an officer employed by him, when taxable to the Attorney	0 50
Mileage per mile, for the distance actually and necessarily travelled, when taxable to the Attorney....	0 10

INSTRUCTIONS FOR PLEADING, &c.

For Special Affidavits, when allowed by the Master, and instructing Counsel upon special matters.....	1 00
Instruction to Counsel in common matters.....	0 50
Instructions for Pleadings in suit.....	1 50
Do. for Brief.....	2 00
Do. for every Suggestion.....	1 00
Do. for Issue of Fact by consent.....	1 50
Do. for Suggestion to revive, or for suit of Revivor, when no rule necessary.....	1 00
Do. for Rule for Writ of Revivor, when necessary	1 00
Do. to defend executor, after suggestion of death of original defendant.....	1 00
Do. for agreement of damages (a)	1 00
Do. for confession of action in Ejectment, as to the whole or in part.....	1 00
Do. to strike or reduce a Special Jury.....	2 00

DRAWING PLEADINGS, &c.

Declaration.....	2 00
If above ten folios, for every folio above ten, in addition	0 20
One or more Pleas, if five folios or under.....	2 00
If above five folios, for every folio in addition	0 20
Joinder of Issue, inclusive of copies and engrossing.	0 50
Demurrer.....	1 00

(a) See C. L. P. A. sec. 155.

	\$	cts.
Joinder of Demurrer, inclusive of copies and engrossing.....	0	50
Marginal statement of matters of Law for argument, exclusive of copies for the Judges.....	1	00
Replications, new Assignment, and other Pleadings, the same as the foregoing charges for Pleas.		
Postea, including engrossing.....	1	00
Judgment, whether by default or final.....	0	50
Authority to receive Moneys out of Court.....	0	50
Suggestions, Pleas to Suggestions, and subsequent Pleadings of three folios or under, inclusive of engrossment.....	0	80
If above three folios, for every folio, drawing and engrossing	0	20
Issue for the trial of facts, by agreement, for every folio.....	0	20
Special case, per folio	0	20
Drawing interrogatories or answers for any purpose required by Law, including engrossing, per folio.	0	20
Agreement of Damages and copy, if five folios, or under.....	1	00
Above five folios, for every folio, drawing and engrossing.....	0	20
Special particulars of demand or set-off, per folio...	0	20
Short, ditto.....	0	50
Bill of Costs, and copy for taxation.....	1	00
Taking Cognovit and entering Judgment thereon, when there has been no previous proceeding, and the true debt does not exceed \$200.....	8	00
For the same services, when the true debt exceeds \$200.....	12	00
Drawing and engrossing Cognovit and attending execution, where there have been previous proceedings	1	00
Replication, accepting money out of Court, in full of demand	0	70
Every necessary letter on the business of the cause.	0	50

COPIES.

	\$	cts.
Declaration when not exceeding ten folios each.....	1	00
Do. above ten folios, per folio each.....	0	10
Other Pleadings before enumerated, above five folios, per folio each.....	0	10
Issue (Pleadings) if fifteen folios or under	1	50
If above fifteen folios, for every folio	0	10
All Proceedings, Interrogatories, Answers, and other papers, of which copies are to be delivered, per folio.	0	10
Judgment for non-appearance on Specially Endorsed Writs, or Writs of Revivor and in Ejectment, to be taken as nine folios, including the Writ.		
Of Special and Common Rules.....	0	75
Of Special Rule, above three folios, per folio additional	0	20
Of Summons or Order of a Judge	0	50
Of Order to charge a prisoner in execution	0	70

NOTICES, INCLUDING COPY.

To declare, reply, and subsequent proceedings	0	50
By Defendant to bring issue to trial	0	50
To executor or Administrator of sole Defendant deceased, to appear to writ and suggestion.....	0	50
Of appearance, when appearance duly entered, and notice given on the day of appearance, but not otherwise	0	50
Of appearance to Writ of Revivor.....	0	50
To plead.....	0	50
Of declaration, when necessary	0	50
Of objection for mis-joinder, or non-joinder of Plaintiff	0	50
To Sheriff to discharge a prisoner out of custody ...	0	50
Notice in Ejectment to defend for part of premises..	1	00
If above three folios, for every folio additional.....	0	20
Notice of claimant's or defendant's title in Ejectment, the same fees.		
Notice of admission of right and denial of ouster by a Joint Tenant, &c.	0	50

	\$	cts.
If above three folios, for every folio.....	0	20
Of discontinuance by claimant in Ejectment.....	0	50
Of confession of action of Ejectment, as to whole or in part	0	50
Of trial or assessment	0	50
Demand of residence of Plaintiff and all other common notices.....	0	50
To admit or produce, if not exceeding two folios.....	0	50
For each folio above two	0	20

ATTENDANCES.

Attendance at Judge's Chambers.....	1	00
Attendance to file or serve	0	50
Attendance to give or receive undertaking to appear when service of process accepted by an attorney.	1	00
Attorney attending Court of Assize, when not him- self Counsel or Partner of Counsel	2	00
Attendance on Master in special matters	1	00
For every hour after the first	1	00
Taxation of costs per hour	1	00
All other necessary attendances	0	50

BRIEFS.

For drawing Brief not exceeding five folios	2	00
Do. per folio additional of original and necessary matter	0	20
Copies of documents, other than Pleadings, when required, per folio	0	10
Copy of issue book and brief for second Counsel, when fee taxed to him, per folio	0	10

TERM FEES AND OTHER FEES.

Term Fee after declaration filed	1	00
Fee on every Record, Writ of Trial, or enquiry.....	1	00
Fee on every Rule of Court or Judge's Order.....	1	00
Fee on attending by Counsel or Attorney, to hear Judgment of Court, when attendance is noted by the Clerk at the time.....	2	00

AFFIDAVITS.

	\$	cts.
Drawing Affidavit per folio.....	0	20
Copies of Affidavits when necessary, per folio.....	0	10
Common Affidavits of Service, when necessary, or of payment of mileage, including copy and oath.	1	00
Mileage on Services as on Writs of Summons.		

DEFENDANTS.

Appearance	0	70
For each additional Defendant.....	0	25
A second summons, and order for time to plead, shall be allowed in special cases, when necessary.		

COUNSEL FEES.

Fee on Motion of Course, or on Motion for Rule Nisi, or on Motion to make Rule absolute, in matters not special.....	2	00
On Special Motion for Rule Nisi (only one Counsel fee to be taxed).....	5	00
To be increased to \$10 in the discretion of the Master at Toronto, who shall mark amount to be taxed on Rule before taxation.		
To attend Reference to Master, when Counsel neces- sary.....	5	00
On revising Pleadings, or Interrogatories, or set- tling or revising Special Cases when necessary, in the discretion of the Master at Toronto, who shall certify the amount to be taxed, before taxation, when Bill taxed in the country not exceeding.....	5	00
Advising on evidence in contested cases, in discre- tion of the Master at Toronto, as above, a sum not exceeding.....	5	00
Fee on argument on supporting or opposing Rules on return of Rule Nisi, or argument of Demurrer, special case or appeal.....	10	00

NOTE—To be increased at the discretion of the Master at Toronto, to a sum not to exceed \$25.00.

\$ cts.

Fee with Brief on Assessments.....	5 00
Fee with Brief at Trial in cases of Tort or in Ejectment, or in matters of contract,	10 00

(When sum to be recovered exceeds \$400, to be increased by taxing officer, in his discretion, to a sum not exceeding \$20 to Senior Counsel, and \$10 Junior Counsel, in actions of a special and important nature; Provided that the Master (at Toronto) shall have power to tax increased fees, provided that more than one Counsel fee shall not be allowed in any case, not of a special and important nature, nor more than two in any case.)

Fee to Counsel on Trial of Issues upon Writ of Trial in the County Court.....	6 00
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Fee to Counsel when Counsel attend on argument or examination in Chambers, which in opinion of the Master required attendance of Counsel.....	2 00
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(But may be increased in the discretion of the Master to \$10.)

Where any Fee is subject to be increased in the discretion of the Master, either party to the taxation may, during its progress, require that such item shall be referred by the Taxing Officer to the Master of the Court at Toronto, whose decision shall be final.

The Master at Toronto may apply to a Judge or the Court, on the taxation of any item which is in his discretion, or is referred to him.

No application shall be allowed by either Attorney or Counsel to a Judge or the Court, in reference to any item which is in the discretion of the Master; but this is not to prevent an application for revision of taxation.

ALLOWANCE TO WITNESSES.

	\$	cts.
To witnesses residing within three miles of the Court House, per diem.....	0	75
To witnesses residing over three miles from the Court House	1	00
Barristers and Attorneys, Physicians and Surgeons, when called upon to give evidence in consequence of any professional services rendered by them, or to give professional opinions, per diem	4	00

CLERK IN CHAMBERS.

For each Fiat granted by a Judge for a writ of Quo Warranto, or for a Rule of Court.....	0	50
For every Summons	0	25
For every Order.....	0	50
For filing each paper.....	0	07
Taking Affidavit	0	20
For making up each final Judgment of the Judge in contested Municipal Election cases, and returning the same into Court.....	1	00
Copies of papers, per folio of 100 words.....	0	10
Every search of not more than two terms.....	0	10
Do. if exceeding two terms and not more than four.....	0	20
Do. if exceeding four terms, or a general search	0	50

CONTESTED MUNICIPAL ELECTIONS.**Attorney.**

<i>Instructions</i> .—To apply for a Writ of Summons or defend against.....	2	00
<i>Statement</i> of grounds of complaint, including a fair copy	2	00
<i>Affidavits</i> whether special or common, per folio of 100 words	0	20
<i>Recognizance</i> —Drawing	1	00

	\$ cts.
<i>Attendances Special</i> —at Chambers, for Writ of Summons, to serve writ, upon the argument, or to hear judgment	1 00
<i>Attendances Common</i> —all other attendances, not mentioned as special, each	0 50
<i>Writs</i> .—Preparing Writ of Summons, Writ of Certiorari, Mandamus, Trial, or Writ of Execution, each.	1 00
Fee on each Writ	1 00
<i>Notices</i> .—Indorsement on Writ of Summons, every other endorsement upon writ, when required to be made, and all common notices, each.....	0 50
<i>Copies</i> of Statement, or other papers and documents, when required to be made or served, half the amount allowed for the original, and where no specific sum is allowed, then copies of papers required, or which may be directed to be made, furnished or served, to be allowed per folio of 100 words	0 10
<i>Issues</i> when directed to be tried, preparing same ...	1 00
<i>Disbursements</i> .—Postages actually paid; mileage when it is necessary to employ parties to serve writs, papers, &c., the actual number of miles travelled to perform the service, per mile	0 10
(The Affidavit must state the number of miles actually travelled, and also that the charge has been paid.)	
<i>N. B.</i> —No instructions to be allowed, nor attendances to swear affidavits.	
Instructions for Briefs, as in ordinary cases.	
Briefs, per folio of original matter, when necessary...	0 20
Briefs, per folio of copy, when necessary.....	0 10

Counsel.

<i>Fee</i> for argument upon the return of the Writ of Summons, if argued by Counsel	10 00
To be increased at the discretion of the Judge, according to the importance of the case, to not exceeding	20 00

**CLERKS OF THE CROWN AND PLEAS AND THEIR
DEPUTIES.**

(As per Statute 27 and 28 Vic. ch. 5.)

	\$ cts.
For taking Recognizance	0 50
For signing and sealing each Writ	0 30
For each Order or Rule of Court.....	0 50
For filing each paper.....	0 10
Copies of papers, per folio of 100 words	0 10

COMMISSIONER.

For taking Recognizance	0 50
Swearing each Affidavit	0 20
Witnesses, Jurors, Sheriff, and other officers, the same fees and allowances as for similar services at Nisi Prius, and in the Courts of Queen's Bench and Common Pleas.	

MICHAELMAS TERM, }
35th Victoriæ. }

(Signed) WM. B. RICHARDS, C. J.
 " JOHN H. HAGARTY, C. J., C. P.
 " JOS. C. MORRISON, J.
 " ADAM WILSON, J.
 " JOHN W. GWYNNE, J.
 " THOMAS GALT, J.

Certified.

ROBERT G. DALTON, C. C. & P., Q. B.
 M. B. JACKSON, C. C. & P., C. P.

IN HILARY TERM, 1872, 7th February, the Courts of Queen's Bench and Common Pleas issued the following Order :--

"It is ordered, That the operation of the Rule of Court of last Michaelmas Term, respecting the Tariff of Fees, shall be and is hereby postponed until the first day of Easter Term next, on which day the same shall come into force."

MEMORANDA.

During this term the following gentlemen were called to the Bar:—

HON. J. H. GRAY, ROBERT WARDROPE, CHARLES RANN WILKES, ALFRED FROST, ARTHUR WELLINGTON FRANCIS, WALTER GIBSON PRINGLE CASSELLS, CHARLES COVERNTON BACKHOUSE, WILLIAM ALEXANDER HAMILTON DUFF, WILLIAM MACDONALD, DAVIDSON BLACK.

IN THE COURT OF ERROR AND APPEAL.

ROYAL CANADIAN BANK V. KELLY ET AL.

Royal Canadian Bank v. Kelly, 20 C. P. 519, reversed in appeal.

APPEAL from a judgment of the Court of Common Pleas, reported in 20 C. P., 519.

The appellant mortgagee (Kelly) had, more than six months after 1st January, 1867, distrained on goods of the Bank for interest (as rent), claimed to be due on a mortgage from one Dewey, dated 23rd February, 1866, payable with principal and interest in one sum on 1st January, 1867. The mortgage was according to the statutory form, containing a provision, as in the Act, that the mortgagee might distrain for arrears of interest, and that till default the mortgagor might remain in possession. The mortgage was not executed by the mortgagee. The mortgagor had, after 1st January, 1867 (the day named for payment), continued in possession under the state of facts shewn at the trial, as given in the report of the case in the Court below. The principal and interest were unpaid. The goods of the Bank, being on the premises, were distrained on for interest from date of mortgage to time for its payment (1st January, 1867), as also for interest from that time till 1st January, 1868. The Bank replevied.

The following were the reasons of appeal: 1. At the time of the distress there was no tenancy existing between the mortgagor and mortgagee at an annual or other rent, in respect of which the mortgagor was entitled to distrain

(a) The case was argued June, 1870, before DRAPER, C. J., App., RICHARDS, C. J., Q. B., HAGARTY, C. J., C. P., MOWATT, V. C., GWYNNE, J., STRONG, V. C.

the goods of third persons then being on the mortgaged premises. 2. There was no such tenancy created by the mortgage: the tenancy, if any, created by the mortgage, had expired more than six months before the distress, and no new tenancy was afterwards created which gave the right of distress exercised by the defendants at the time the same was exercised. 3. The evidence tendered by plaintiffs, to shew that the mortgage was satisfied, should have been received. 4. The Judge who tried the cause having taken an erroneous view of the law and decided against plaintiffs on insufficient evidence, the Court of Common Pleas should, under the Law Reform Amendment Act (33 Vic., cap. 7, sec. 6), have pronounced the verdict which the Judge who tried the cause ought to have pronounced, that is to say, verdict for plaintiffs, have amended the *postea*, and entered the verdict accordingly for the plaintiffs. 5. The rule *nisi* for a new trial should at all events have been made absolute on the grounds therein stated, or some of them.

Harrison, Q. C., and *Leith*, for the appellants. Admitting even that there was a tenancy, still, as a matter of *construction* of the instrument, the tenancy was not at a rent. The distress clause must be regarded as a mere collateral license to take the goods of the mortgagor,—*Freeman v. Edwards*, 2 Ex. 732; *Fisher on Mortgage*, 468, 469,—but must not be taken as superadding to the tenancy a rent in the nature of rent service, for which the mortgagee could distrain on goods of third persons. The language of the distress clause negatives the idea of rent being reserved as rent service; it gives power to distrain for interest, and “to recover by way of rent reserved as in case of a demise”. It gives power also to distrain for the costs and expenses as in cases of distress for rent, which latter power would be wholly unnecessary, if, as contended by the respondents, the tenancy created was at a rent. If the distress clause is to be regarded as creating a rent service, then there would be a double liability in case of default, viz., for

interest and for rent; and there was no provision that payment of the one should be satisfaction of the other. In *Walker v. Giles*, 6 C. B. 662, this difficulty presented itself, and the Court there held there was no tenancy at a rent. It was dealt with again by Parke, B., in *Pinhorn v. Souster*, 8 Ex. 763, and, *arguendo*, p. 768. There would also be the incongruity of the heir being entitled to the amount as rent and the executor as interest, in case of the death of the mortgagee. What was wanted to create a tenancy at a rent, for which the mortgagee might distrain as a landlord, was an addition to the possessory clause, thus, "at a rent, equivalent to, and in satisfaction of, and payable on the same days as, the interest moneys."

The mortgage could not operate as a grant of a rent charge, since, if the grant of the land were to be regarded as taking effect before the grant of the charge, then the charge would be void for want of estate in the mortgagor whereout to grant it: *Freeman v. Edwards*, 2 Ex. 732, per Parke, B.; *Doe dem Garrod v. Olley*, 12 A. & E. 481, per Patteson, J. If, on the other hand, the grant of the charge were deemed to precede the grant of the land, then the former would be extinguished by the latter grant; and under any circumstances the unity of ownership of the land and the charge caused a merger of the charge: Notes to Clun's case, Tudor's Lg. Ca. 269, 270, 2nd ed.

Admitting even the construction contended for by the respondents, and that there was an intention to create a tenancy at a rent, still the *reservation* of the rent was bad, for the covenant to pay the interest was to pay to the personal representatives, who were strangers to the reversion. Such covenant did not run with the land, but was a collateral covenant to pay a sum in gross; and, as the right under the distress clause did not arise except on non-performance of such covenant, the reservation was bad as being uncertain, conditional and dependent on non-performance of a collateral matter to be performed in favor of strangers to the reversion.

Admitting a tenancy and valid reservation of rent up to

1st January, 1867, still the tenancy then ended, and as the distress was made more than six months afterwards, it could not be upheld under the Statute of 8 Anne, ch. 14.

Counsel for the appellants differed in their views as to the nature of the tenancy from the date of the mortgage, *Harrison* pronouncing it a tenancy at will, by reason of the character of the possessory clause, and non-execution by the mortgagee, *Leith* contending that it was a tenancy for a term certain up to 1st January, 1867, after which day the mortgagor was a mere overholding tenant, and consequently liable to no rent, and that the acceptance of the mortgage, though not executed by the mortgagee, was evidence of a valid parol demise to 1st January, 1867; that if not valid as a parol demise, still, as the intention was apparent, that the mortgagor was to have certain right to possession up to 1st January, 1867, the Court would, to give such right, execute the term in the mortgagor by way of use out of the seisin of the mortgagee, as suggested by Blackburn, J., in *Morton v. Woods*, L. R. 3 Q. B. 658, and *arguendo*.

After the 1st January, 1867, there was no tenancy at any rent; the mortgagor was a mere overholding tenant; there was nothing in the evidence to shew creation of a new tenancy, or that the parties were assenting to continuance of possession. The mortgagee could have ejected the mortgagor without notice or demand of possession: *Wilkinson v. Hall*, 3 B. N. C., 533; *Doe dem Fisher v. Giles*, 5 Bing. 423; 1 Smith, Lg. Ca. 6th ed. p. 528, notes to *Keech v. Hall*. Mere absence of dissent by a landlord to the continuance of possession by his tenant after expiration of the term, would not suffice to constitute a new tenancy at will or otherwise, or preclude the landlord from treating the overholding tenant as a trespasser: Co. Lit. 55; *Woodfall* L. & T. 9th ed. p. 190; *Evans v. Elliott*, 9 A. E. 354: 1 Smith Lg. Ca. 6th ed. p. 536. As regards any claim for interest, as rent, or for rent, as interest after the first of January, 1867, and especially as to the grounds in that respect on which the judgment of the Court below

proceeded, after 1st January, 1867, no interest was made payable by the mortgage, and therefore could not be claimed as of right, but merely as damages, to be allowed or not as a jury might think fit; and the rule as to interest on bills and notes does not apply, as the statute gives interest after protest as a matter of right and as part of the debt; Consol. Stat. U. C. ch. 43, s.s. 2, 10, 11: *Towsley v. Wythes* 16 U. C. 139; consequently, the mortgagee could not after that date, even though a tenancy existed, distrain for interest as a sum certain due as of right as a fixed rent. There was no evidence of any agreement, expressed or implied, by the mortgagor to pay either interest or rent after 1st January, 1867.

C. Patterson and *Anderson*, for the respondents, contended that the effect of the possessory and distress clause was to create a tenancy at a rent equivalent to the interest, for which a distress could be made on goods of third persons on the premises; that the continuance in possession by the mortgagors after 1st January, 1867, without any dissent by the mortgagee, was sufficient evidence of continuance of the tenancy, or at any rate of the creation of a new tenancy, and that the mortgagee might and did elect to treat the mortgagor as his tenant instead of as a trespasser after 1st January, 1867.

They referred to the following cases: *Harry v. Anderson*, 13 C. P. 476; *Doe Thomas v. Fields*, 2 Dowl. 542; *Jolly v. Arbuthnot*, 4 DeG. & J. 224, S. C. 5 Jur. N. S. 689; *Ford v. Jones*, 12 C. P. 358; *Hope v. White*, 17 C. P. 52, 18 C. P. 430, 19 C. P. 479.

The judgment of the Court below was subsequently reversed; Gwynne, J., however, concurring only on the ground that after 1st of January, 1867, interest was not due as of right, but only as damages, a point which, he said, had not been raised in the Court below (a).

Appeal allowed.

(a) The judgment of the Court, which was delivered by Draper, C. J., of Appeal, was mislaid immediately on delivery, but will be published as soon as it comes to hand.

EASTER TERM, 35 VICTORIA, 1872.

(From May 20th to June 8th.)

Present :

THE HON. JOHN HAWKINS HAGARTY, C.J.

“ “ JOHN WELLINGTON GWYNNE, J.

“ “ THOMAS GALT, J.

STEWART V. TAGGART.

Sale of land for taxes—Whole lot previously assessed—Subsequent assessment of half, and apportionment of taxes between both halves—Collector not bound to search for distress—32 Vic., ch. 36—Treasurer's list : its contents and time of furnishing—Quantity need not be described—Party assessed may purchase.

A lot, previously assessed as to the whole, was, on claim made to half of it, assessed as to this half, and the taxes of previous years apportioned between both halves : *Held*, that there was no objection to this.

Where land is assessed and taxes imposed, an omission by the collector to demand and levy the amount from property on the premises, cannot, since 32 Vic. ch. 36, avoid the sale.

The treasurer's list, under secs. 110 and 131 of the above act, is sufficiently furnished at any time during the month of February.

This list need not contain the amount in arrear.

A designation, in the list, thus “the N. or W. $\frac{1}{2}$ 14,” *held* sufficient.

It is not necessary at a sale of land for taxes to describe particularly the portion of the land to be sold, and therefore a sale of “89 acres” of a particular lot was *held* sufficient.

The party assessed may become the purchaser of the land sold for taxes.

EJECTMENT for 89 acres, west-half lot 14, 9th concession of Wawanosh.

Plaintiff claimed under a tax title; defendant, as tenant to one Owens.

At the trial, at Goderich, before Gwynne, J., plaintiff proved a deed from the warden and treasurer to him (dated 1st December, 1870,) of the land claimed, setting out a warrant, dated 3rd August, 1869, and a sale, 30th

November, 1869, for \$54.59, arrears of taxes up to 31st December, 1868. The warrant was admitted, as stated, to have been for taxes claimed for 1865, 1866, 1867, and 1868; that proper advertisements had been made; that the whole lot, 200 acres, had been assessed in 1865 and 1866 on the non-resident roll; that in 1867 and 1868 the west-half had been assessed to plaintiff, as owner, but that he was not residing on the lot, but lived about one and a-half miles distant, in the next township; that the collector had returned the taxes for 1867 and 1868 as unpaid; that the collector made no demand for these taxes; that in the return made by the treasurer to the township clerk, in 1869, the lot was described thus: "S. or E. $\frac{1}{2}$ of 14, and N. or W. $\frac{1}{2}$ 14," and no amount was stated as due; and for 1869 this west half was assessed on the non-resident roll.

The treasurer was called, and proved the sale and non-redemption. At the sale his entry was: "W. $\frac{1}{2}$ 14, 9th con., 100 acres, \$54.59. Nov. 30, Mr. Stewart, 89 acres, \$54.59." He had not before, or at the sale, ascertained or determined what portion should be sold as most advantageous; but it was some days after the sale that he did so, according to the best of his judgment. He did not know of any clearing or improvement on the land sold. On the 30th January, he mailed the list to the township clerk in Wawanosh. This clerk had subsequently died, and he could not say whether it would reach that day. In 1867, the treasurer divided the taxes of preceding years between the east and west halves. The west half was returned in 1867, with taxes not collected, the reason given being "non-resident." In 1868 the same was the entry in the resident roll.

For the defence, the defendant swore that he had been living on the west half for four years, to May, 1871, and had improved it; that he had built a house in 1867; and that there was ample property out of which the arrears could have been made; that no taxes had ever been demanded of him; that in 1870 he had had his name put

on the lot ; that part of his house might be on the road ; that he was a squatter without title.

There was other evidence on this.

It was also shewn that, in course of mail, a letter posted January 30 would be at the post-office in Wawanosh about 7 P.M. 1st February.

For the defence it was objected, 1st, that the lot should not have been divided in 1867, and the taxes of that year were not sufficiently in arrear ; 2nd, that there was a distress in 1868 sufficient to cover the taxes ; 3rd, that no demand had been made for the taxes ; 4th, that no proper list had been furnished to the township clerk, nor proper half designated, and no amount stated ; 5th, list not proved to have been forwarded by 1st February ; 6th, the sale was void, because the treasurer did not select the land actually sold, *i.e.*, there were no particular 89 acres sold ; 7th, that plaintiff, being assessed as owner, could not purchase, and arrears should have been collected out of his property in Ashfield, being within the county ; that there was no proper return under sec. 111 of the Act.

There was a verdict rendered for plaintiff, subject to the opinion of the Court on these objections.

In Michaelmas Term, *Harrison*, Q.C., obtained a rule on these grounds, to which

A. Richards, Q.C., shewed cause, citing 29 & 30 Vic., ch. 53, secs. 95, 96, 112, 131 ; *Laughtenborough v. McLean*, 14 C. P. 175 ; *Payne v. Goodyear*, 26 U. C. 448 ; *Allan v. Fisher*, 13 C. P. 63 ; *Raynes v. Crowder*, 14 C. P. 111 ; *Hall v. Hill*, 22 U. C. 578 ; *Cotter v. Sutherland*, 18 C. P. 395 ; 32 Vic., ch. 36, sec. 130 (O.)

Harrison, contra, cited *Knaggs v. Ledyard*, 12 Grant, 320 ; *Harbourne v. Bushey*, 7 C. P. 46 ; *Munro v. Gray*, 12 U. C. 647 ; *Mills v. McKay*, 15 Grant, 192 ; *Warne v. Coulter*, 25 U. C. 177 ; *Townsend v. Elliott*, 12 C. P. 217 ; *Doe Upper v. Edwards*, 5 U. C. 594 ; *Quackenbush v. Snider*, 13 C. P. 196 ; *Grant v. Gilmour*, 21 C. P. 18 ; *Charlesworth v. Ward*, 31 U. C. 94.

HAGARTY, C. J., delivered the judgment of the Court.

We do not see how the treasurer could have done otherwise than divide the lot in 1867. It is not for him to examine critically each man's claim to land. The claim of plaintiff in 1867 was made to this west half, and, without reference to the goodness or badness of such claim, the division was made in good faith. Under secs. 24, 25, and 27, in the Act of 1866, we think no objection can be urged to the course taken. The assessments for 1865 and 1866 were equally divided between the halves, and from thenceforward they were assessed separately. No injustice was done to any one by this proceeding.

Then, as to the existing distress. These proceedings were under the Act of 1866, and with this point we may conveniently consider the other objections as to the absence of any demand of the taxes.

Sec. 95 directs the collector to call at least once on the party taxed, if within the local municipality, and if the person (sec. 96) whose name is on the roll reside outside the municipality, he shall notify him by post. These are preliminary requirements to a distress.

By sec. 98, where a non-resident has required his name to be put on the roll, the collector shall notify by post, and may distrain anything on the land.

Here the name on the roll was that of Stewart, who lived in another township, and the defendant, in 1867, had nothing to do with it, and in 1868, when he alleges he had the property there, was still not on the roll. The collector might, on taking the proper steps, have levied the arrears by distress on the lot.

When the treasurer (sec. 127) knows there is distress, he may levy it. The Act of 1868-9, 32 Vic., ch. 36, sec. 130, directs that the treasurer need not make enquiry as to distress before selling, and if any tax shall have been due for the third year preceding the sale, and no redemption within the year, the sale, if openly and fairly conducted, shall be final and binding, "it being intended by this Act that all owners of land shall be required to pay

the arrears of taxes due thereon within the period of three years, or redeem the same within one year after the treasurer's sale thereof."

I am of opinion that if the land was assessed, and the taxes in fact unpaid, an omission by the collector to levy the amount from property which, by due diligence, he might have found liable thereto, cannot, in the present state of the law, avoid the sale.

It cannot be, in my judgment, that the validity of the sale is to depend on the diligence, or want of diligence, in a collector in some previous year. The want of a demand may be a good reason to avoid a distress, but one very insufficient for the purpose it is now used. The clause of the Act above cited seems to throw the onus on the owners or parties interested in lands "to pay the arrears of taxes due," and not to lie by, trusting to some irregularity or omission on the part of assessors or collectors.

We see no reason to doubt the fact of this land being assessed for and chargeable with these four years' arrears of taxes. I fully agree with the view expressed by Draper, C. J., in *Allan v. Fisher* (13 C. P. 70): "It appears to me impossible to hold that the collector's neglect to search for goods which, with diligence, he might have found, or to enquire with sufficient care for the address of the party assessed on his roll, in order to transmit a statement to him by post, can have that effect," viz., to avoid the sale. This is quoted approvingly by the present Chancellor, in *Bank of Toronto v. Fanning* (17 Grant, 517).

Allan v. Fisher certainly held that when the lot was occupied, and A. B. known and recognized as the owner, and full distress thereon, it was the duty of the assessor to enter A. B.'s name as owner, and the name also of a known occupant. Instead of this, he inserted the lot on the roll as land of a non-resident, without any name. The result was, that during that year no officer but the treasurer could receive the rates, and would be the only officer who could distrain; and the Court held the assessment for that year invalid, and the sale avoided. This decision was in 1863, under (apparently) 16 Vic., ch. 182.

The present case is very different. The assessments for 1865, 1866, and 1867, are, I think, regular, for reasons stated. In 1868, the first year that distress is alleged to have been on the lot, Stewart was the person assessed, and was on the resident roll, and returned as not collected on the absentee list. Therefore it seems to me to fall within the doctrine of *Allan v. Fisher*, as being merely a case of neglect to search for distress, or to notify the absent owner. The omission of duty did not, as in the case cited, cause the land to be placed on the non-resident roll, and thus take the collection out of the hands of the local officer. Several of the Judges in the Court of Appeal, in *Bank of Toronto v. Fanning* (18 Grant, 391), consider everything cured if any part of the taxes be in arrear for the statutable period.

We hold this objection to fail without the aid of this view of the law.

As to the treasurer's list to be furnished to the clerk, sec. 110 (1869) directs him to send a list of all the lands in respect of which any taxes shall have been in arrear for three years preceding the first day of January in any year, such list to be furnished on or before the first day of February. Sec. 131 forbids the sale of any lands not included in the lists furnished to the clerk in the month of February preceding the sale.

Even if we found it clearly proved (which it is not) that the list here was not furnished till after 1st February, we should hold that its being furnished any time during February would be sufficient under these two sections. The section gives the heading that is to be on the list; it does not say in terms that the amount of taxes in arrear shall be stated in the list.

It is objected that the list sent 30th January, 1869, gave no amounts of arrears, but merely the list of the lands liable to be sold for arrears of taxes in the year 1869.

This land appears as "9th Con., S. or E. $\frac{1}{2}$ 14; N. or W. $\frac{1}{2}$ 14." I see no objection to calling it the north, or west half. The land probably lies N. W. or S. E., and

nothing was shewn that the description would not sufficiently identify it.

The effect of secs. 111, 112, 113, and 114, seems to be that the fact of the land being in arrear, and liable to be sold, shall be communicated by the treasurer to the township clerk, who shall give copy of the list to the assessors, who shall ascertain if any of the lots named are occupied, and notify the occupants, and the owners, if known, that the land is liable to be sold for arrears of taxes, and enter in a column, "occupied, and parties notified," or, "not occupied." The clerk is then to ascertain if any lot on the list is entered as occupied. He shall notify the treasurer thereof, and the latter, by the 1st July, shall return to the clerk an account of all arrears of taxes due in respect of such occupied lands, and the clerk shall then put the amounts in the collector's roll for the year, to be collected, &c.

The objection that the treasurer's list, filed at the trial, as sent in January, does not therefore avail.

I hardly understand the force of the objection that there was no proper return under sec. 111. The only return there spoken of is that by the assessor to the clerk.

No evidence was given or enquiry made respecting this matter when the witnesses were being examined, and we do not see how we are to assume anything to be wrong.

As to the objection that at the sale no particular 89 acres was sold, it is cured by the statute of 1868-9, sec. 138: "It shall not be necessary to describe particularly the portion of the lot which shall be sold, but it shall be sufficient to say that he will sell so much of the lot as shall be necessary to secure the payment of the taxes due." By sec. 141, after selling, the treasurer shall give a certificate stating distinctly what part of the land has been so sold, &c.

We see nothing in the objection that the plaintiff could not purchase, having been assessed for the land.

We think the rule should be discharged.

Rule discharged.

HARMAN V. CLARKSON.

Insolvency—Innkeeper not a trader.

Held, reversing the judgment of the County Court, that an inn-keeper is not a trader within the meaning of the Insolvent Act of 1869.

APPEAL from the County Court of the County of Peel, in an interpleader issue.

The appellant was execution creditor of one Atchison, an inn-keeper, who, after execution issued, made an assignment to the respondent, defendant in the issue, and claimant of the goods seized.

The Judge of the County Court held that Atchison was a trader within the Insolvent Act of 1869, and that his assignment was entitled to prevail against the execution.

The ground of appeal was that an inn-keeper was not a trader within the meaning of the above Act, and that his assignment could not therefore prevail against the execution in question.

George Harman, for the appeal, contended that an inn-keeper was not a trader within the meaning of the Insolvent Act; that the definition of a trader was one who bought and sold, while an innkeeper could not be said to buy and sell, as he only bought for a particular object, namely, to spend in his house, and that a great portion of his gains arose from the use of his rooms, the attendance of his servants, &c.; and in the cases decided upon the Imperial Statute, 21 Jas. I., ch. 19, in which a trader was defined to be one "seeking to gain his living by buying and selling," an inn-keeper was expressly held not to be a trader within the meaning of that Act. Referring to the judgment of the County Court Judge, he contended that our Statute, 7 Vic., ch. 10, in which an inn-keeper is mentioned as coming under the definition trader, "within the meaning of that Act," not being now in force, could not consequently be relied on to explain the meaning of the word, nor could our Courts be influenced by the decisions of the Courts in

the Province of Quebec, whose decisions were based upon a different system of jurisprudence, namely, the French code. He cited the following cases: *Crip v. Pratt*, Cro. Car. 549; *Newton v. Trigg*, 3 Mod. 329; *Saunderson v. Rowles*, 4 Burr, 2065; *Willett v. Thomas*, 2 Chitty, 657; *Buscall v. Hogg*, 3 Wil. 146; *Putnam v. Vaughan*, 1 T. R. 572.

Lash, contra. In all the English cases evidence was given of the particular nature of the business carried on, and each case was decided on its own merits. There is nothing here to shew what Atchison's business was: he may have been a trader. Our Act, 7 Vic., ch. 10, and the Imperial Act, 12 & 13 Vic., ch. 106, sec. 65, both include inn-keeper in the word "trader." The Insolvent Act of 1869 should receive a more liberal construction than the Act of James, as that Act was penal in its nature. In *Bagwell v. Hamilton*, 10 L. J. U. C. 305, the Judge referred to 7 Vic., ch. 10, for a definition of the word trader. An inn-keeper buys and sells food, fodder for cattle, liquors, &c., and in some cases deals very largely with wholesale and retail merchants, and should be held to be a trader.

HAGARTY, C. J.—The sole question presented by this appeal is, whether an "innkeeper" is a "trader" within the operation of the Insolvent Act of 1869.

This Act professes to assimilate the Bankruptcy and Insolvency Laws of the different Provinces, and its first section declares that "This Act shall apply to traders only," giving no definition or explanation of that term.

The Act of 1864, sec. 1, declares, "This Act shall apply in Lower Canada to traders only, and in Upper Canada to all persons, whether traders or non-traders." In sec. 3, sub-secs. 2 and 3, provisions are made as to traders not meeting commercial engagements. Sec. 12, sub-sec. 5, declares that all the provisions in the Act respecting traders shall be held to apply equally to unincorporated trading companies and co-partnerships.

The Amending Act, 1865, sec. 3, makes a further provision respecting a trader's permitting an execution to remain unsatisfied, &c.

No definition is given of the word. The Bankrupt Act of 1843, 7 Vic., ch. 10, made liable to its provisions all persons being merchants, or using the trade of merchandize, bankers, brokers, persons insuring ships or other vessels, &c., builders, carpenters, shipwrights, keepers of inns, taverns, hotels, coffee houses, millers, &c., and all persons who, either for themselves or as agents or factors for others, seek their living by buying or selling, or by buying or letting for hire, or by the workmanship of goods or commodities, shall be deemed traders within the scope and meaning of this Act. This Act, originally limited to two years, was continued from time to time, and finally was allowed to expire about the year 18—.

An insolvent Court was established, 8 Vic., ch. 48, but containing nothing bearing on this question: Consol. Stat. U. C., ch. 18. See also Consol. Stat. U. C., ch. 26, for relief of insolvent debtors.

The various Imperial Statutes are set out in *Cook's Bankrupt Law*, Vol. I. The Act 34 & 35 Hen. VIII. ch. 4, does not describe bankrupts beyond "divers persons craftily obtaining into their hands great substance of other men's goods, suddenly fleeing to parts unknown."

13 Eliz., ch. 7, declares who is to be deemed a bankrupt: "Any merchant or other person using or exercising the trade of merchandize by way of bargaining, exchange, rechange, bartry, chevisance, or otherwise, in gross or in retail, seeking his or her trade or living by buying or selling."

1 Jac. I., ch. 15, reciting that "frauds and deceits, as new diseases, daily increase," repeats the definition, with slight verbal alterations, substituting "persons" for "merchants."

21 Jac. I., ch. 19, (still lamenting the increase of fraud), adds to the definition, "the trade or profession of a scrivener, receiving other men's moneys or estates into his trust or custody."

13 & 14 Car. II., ch. 24, exempts certain persons putting stock into companies from the Bankrupt Laws.

10 Ann, ch. 15, repeals the description of a bankrupt in the statutes of James.

5 Geo. II., ch. 30, sec. 39, makes "persons dealing as bankers, brokers, and factors," liable to be bankrupts.

4 Geo. III., ch. 33, speaks of "merchants, bankers, brokers, factors, scriveners, and traders," as liable to Bankrupt Laws.

45 Geo. III., ch. 124, repeats the same description.

So the law seems to have remained till the 6 Geo. IV., ch. 16, by which, amongst many others, "victuallers, keepers of inns, taverns, hotels, or coffee houses," shall be deemed traders liable to become bankrupts.

Down to the passing of this Act (1825), it seems clear that an innkeeper, simply as such, was not a trader within the meaning of the statutes.

In *Smith v. Scott* (9 Bing. 16) (1832), Tindal, C. J., says: "The question turns on the construction of the late Bankrupt Act, which for the first time has rendered subject to the bankrupt law the vocation of "victuallers, keepers of inns, taverns, hotels, or coffee houses." See also *Gibson v. King* (10 M. & W. 667).

Saunderson v. Rowles (4 Bur. 2067) is a decision of Lord Mansfield, that a victualler was not within the Act. He says: "We are all clear that this man is not within these laws, upon the authority of the determined case of an innkeeper, and also upon the reason of the thing." These reasons are fully set out. "It is not such a contract as is made amongst merchants and shopkeepers, or other dealers, in the ordinary course of trade or commerce."

It seems perfectly clear that under the term "trader," unassisted by statutable interpretation, an innkeeper, as such, is not subject to the bankrupt laws.

The learned Judge in the Court below considered that, as the 7 Vic., ch. 10, defined the expression "trader," and declared that innkeepers should be considered traders within the scope and meaning of that Act, that we might consider this a Legislative declaration on the point. I am unable to accede to this view.

The Act in question was allowed to expire, and our Legislature for some years abandoned the policy of the bankrupt laws. In 1864 it passed a law, applying its principles only in Lower Canada, and to all persons, traders, or non-traders in this Province. Then the existing law of 1869 declares expressly that it shall apply to "traders only."

I do not see what right we have to give this word any larger meaning than it has in itself, or to include within its meaning the numerous classes of persons declared by a long expired, temporary Act, to be within its scope and meaning.

If the 6 Geo. IV. had been allowed to expire in England, or had been repealed, and after some years a new Statute had reverted to the already cited definition of 13 Eliz., ch. 7, I am of opinion that it would have been impossible to apply the Act to the classes embraced by the repealed Act. If our expired Act absolutely made all the persons therein specified "traders," they would be so for all purposes other (I presume) besides those of bankruptcy. But it only makes an inn-keeper, as I understand it, a trader "within the scope and meaning of the Act." Our Legislature, I consider, have advisedly used a special term, "trader," without in any way enlarging its meaning. Whoever is included in the term "trader," standing in its unexplained sense, is within the Insolvent Law. No one else can be, as it seems to me. Therefore, on the express decisions in the English Courts, down to the 6 Geo. IV., ch. 16, when the inn-keepers first came under the Bankrupt Law, I think we are bound to allow this appeal.

An inn-keeper may, of course, be shewn to be within the law by some trading carried on apart from the mere position of an inn-keeper; but, simply *quatenus* inn-keeper, he was held not to be within the law.

I have referred to the authorities mentioned in the decision below. *Popham* on the Insolvent Law, p. 18, states: "In the Province of Quebec, there is a wider signification given to the meaning of the word, as regards its

application to the Insolvent Law. The word "trades" is there held to embrace (here follow many classes): "Hotel, tavern, eating-house, and boarding-house keepers," referring to *Patterson v. Walsh* (*Robertson's Digest*, 49), *McRoberts v. Scott* (*Ib.*) The first case is a decision in the year 1819, and decides that a tavern-keeper is a trader and dealer, and his note to a merchant, payable to his order, may be transferred by a blank endorsement: it is a commercial note. So in *McRoberts v. Scott*, in 1821. I have examined all the cases referred to in the book, as far as I can find them. They all seem to hold merely that such persons are to be governed by commercial law, and do not refer to Insolvent or Bankrupt Acts. For instance, to shew that "auctioneers" are traders, *Pozer v. Clapham* (*Stuart's Appeal Cases*, 122,) is cited; an action brought by co-partners in trade against a merchant, to recover money overpaid to him on a sale: *Per curiam*, "This is clearly a commercial matter, and consequently the proof must be weighed, according to the rules of evidence, by the law of England." It refers to a decision of 1809, that the transactions of tradesmen and artisans, in the way of their trade, are to be considered as commercial matters, and recourse must be had to the English laws of evidence, under 10th sec., Ord. 25, Geo. III., ch. 2.

I can find no decision of a Lower Canada Court on this Insolvent Act. There may be such, no doubt. In Ontario I see no rule for our guidance, but the Statute law already referred to.

GWYNNE, J.—The Act appears to be defective in not having a clause defining the meaning of the term "traders"

NOTE.—*Richardson's Dictionary*: "*Trading* or *Trade*, a way or course, trodden and re-trodden, passed and re-passed, a way or course pursued or kept, a concourse or intercourse, a regular or habitual course or practice, employment, occupation in merchandize or commerce, intercourse for buying, selling or bartering, commerce, traffic."

Imperial Dictionary: "*Trader*, one engaged in trade or commerce, a dealer in buying, in selling or barter. *Trade* is chiefly used to denote the barter or purchase and sale of goods, wares and merchandize, either by wholesale or retail."

as used in the Act, and giving to it a more extended application than in its ordinary acceptation it has. There are interpretation clauses (142 & 143) defining the meaning to be attached to divers words used in the Act; but the term "traders" is not one of them. In the absence of a statutory declaration of the description of persons intended to be comprehended in the term, we must construe it according to its ordinary acceptation. It was at a very early period decided, in *Swyft v. Eyres* (Cro. Car. 546), and *Newton v. Trigg* (3 Mod. 329), that an inn-keeper, *qua*. inn-keeper, was not a trader within the Statutes relating to bankrupts, unless so declared to be by those Statutes. Ever since these decisions it has been customary for the Legislature to declare, in the several Bankrupt Laws which have been enacted, who shall be deemed to be traders within their provisions. In the absence of such a declaration we must be governed by the old decisions, and hold that within the Insolvent Act of 1869, an inn-keeper, *qua*. inn-keeper, is not a trader.

The judgment to be entered below will be judgment for the plaintiff therein, the now appellant, with costs.

GALT, J., concurred.

Appeal allowed, with costs.

BREEN AND WIFE V. McDONALD.

Action by husband and wife—Slander—Words not set out—Joint and several claim for damages—Pleading.

The first and second counts of a declaration, in an action by husband and wife, charged slander of wife, consisting of imputations of adultery and prostitution, without setting out the words :

Held, clearly bad.

The third count was for assaulting wife, whereby, &c. ; and the fourth and fifth counts were, respectively, for assault of wife, *per quod consortium amisit*, and of husband himself. The plaintiffs claimed damages jointly under the first four counts, and the husband alone under the fifth count : *Semble*, that the claim for damages by both plaintiffs, though bad as to the fourth count, was good as to the first three ; but that both plaintiffs being expressed in the declaration to sue in respect of all the counts, though the husband alone, at the conclusion, claimed in respect of the fifth count, the whole declaration was bad.

ACTION by husband and wife for, 1st count, slander of wife, imputing adultery and prostitution, alleging special damages to plaintiffs, as grocers. 2nd count. Slandering wife, imputing adultery and prostitution, alleging special damages to husband as a grocer. 3rd count. Assault of wife, whereby she became sick, &c. 4th count. Assault of wife, whereby she became sick, and husband was deprived of her services, &c. 5th count. Assault of husband.

The declaration concluded, " And the plaintiffs claim, under the first, second, third, and fourth counts, \$2,500, and the plaintiff Andrew Breen claims, under the fifth count, \$1,200.

Demurrer (to 1st and 2nd) counts, that the words imputing adultery and prostitution were not set out in said counts.

Demurrer to the whole declaration, that plaintiffs claimed damages in respect of matters alleged in the fourth count, whereas plaintiff Andrew Breen was alone entitled to such damages.

Armour, Q. C., for the demurrer, cited *Smith v. Spencer*, 12 C. P. 277 ; *Fraser v. Hickman*, 12 C. P. 213, 584 ; *Atkinson v. Fosbrooke*, L. R. 1 Q. B. 628.

No one appeared to support the declaration.

GWYNNE, J., delivered the judgment of the Court.

In this case there had been no argument offered to us in support of the counts demurred to, or any of them. The first and second counts are clearly bad. It was contended further that the third, fourth, and fifth counts are bad, that is, that the whole declaration is bad, because the plaintiffs, husband and wife together, claim the damages sought to be recovered under the fourth count, which are damages recoverable at suit of the husband alone. I am not prepared to say that such a defect existing in the claim for damages only can affect more than the count wherein joint damages are not recoverable. Where husband and wife claim damages jointly in respect of four counts, and are entitled to joint damages in respect of the first three counts, if they succeed in proving them, but the husband only in respect of the fourth, such a claim I think may be a good claim of damages in respect of the first three counts, though bad in respect of the fourth.

But as this declaration is framed it is the husband and wife together who are in the declaration expressed to sue in respect of all the counts, although the husband alone at the close of the declaration claims the damage in respect of the fifth count. I think that in actions of this peculiar nature, where the husband is allowed to join claims for which he alone could sue, to causes of action in respect of which husband and wife must join, without causing misjoinder, the count, in respect of which husband could only sue alone, should state in the commencement that it is the husband who is suing in respect of that count, thus: "And the plaintiff A. B. (the husband) also sues the defendant, for that," &c. According to the precedent given in *Bullen & Leake* 296, instead of as here, the husband and wife sue the defendant, for that, as in fifth count, the defendant assaulted the husband alone. We do not think that the modern disregard of objections as to form warrants us in disregarding a defect of this nature. Let judgment therefore be for the demurrer as to all the counts of the declaration.

Judgment accordingly.

EX REL. CLEMENT v. COUNTY OF WENTWORTH.

By-law in aid of railway—Ratepayers' assent not obtained—By-law quashed.

A by-law of a County Council, in aid of a railway, to the extent of \$20,000, which had not been submitted to the ratepayers under the Municipal Institutions Act of 1866, was, on that ground, quashed.

IN Hilary Term last *F. Osler* obtained a rule to quash By-law No. 210, entitled "A By-law to aid the Hamilton and Lake Erie Railway Company, by a free grant or donation of debentures, by way of bonus, to the extent of \$20,000," on certain terms, &c., on the ground that it was passed by the County Council without having been submitted to the vote, and without securing the assent, of the ratepayers, and on other grounds.

It was admitted that the by-law had not been submitted to the ratepayers.

The by-law recited the desire of the Council to aid the railway by a free grant or donation of debentures to the extent of \$20,000, and that it would require \$2,200 to be raised annually by special rate to pay the debentures and interest. The debentures were to be payable within twenty years, interest at six per cent., half yearly.

Burton, Q. C., now shewed cause, and urged, first, that, on the construction of the Act, it was not necessary to submit any by-law granting a bonus to a railway to the ratepayers, irrespective of the amount.

Secondly, that, as this by-law was for an amount not exceeding \$20,000, it need not be so submitted. He cited *Bramston v. Mayor of Colchester*, 6 E. & B. 246.

Osler, contra, referred to *McLean v. Cornwall*, 31 U. C. 314; *Jenkins v. Corporation of Elgin*, 21 C. P. 325; *Dwarris Statutes*, 568.

HAGARTY, C. J.—Section 349 of the Municipal Act of 1866 declares that a municipality may pass by-laws, 1. For subscribing for shares, or lending to or guaranteeing the payment of any sum of money borrowed by a railway

corporation, to which section 18 of 14 & 15 Vic. ch. 51, (Ry. Consol. Act), or sec. 75 to 78 of Railway Consolidated Act, have been or may be made applicable by any special Act. 2. For endorsing or guaranteeing debentures of railway companies. 3. For issuing debentures therefor. 4. For prescribing the manner and form of debentures, and how they are to be signed. "But no Municipal Corporation shall subscribe for stock or incur a debt or liability for the purposes aforesaid, unless the by-law, before the final passing thereof, shall receive the assent of the electors of the municipality in the manner provided by this Act."

By the Ontario Act 34 Vic. ch. 30, sec. 6, it is provided, "the following sub-section is added to section 349 of said Act, "For granting bonuses to any railway, and to any number of persons or Company establishing and maintaining manufacturing establishments within the bounds of such municipality, and for issuing debentures payable at such time or times, and bearing or not bearing interest, as the municipality may think meet, for the purpose of raising money to meet such bonuses."

Mr. Burton urged that this new sub-section was to be added to section 349, and would properly come after and not before the proviso as to submitting the by-law to the ratepayers.

We are fully satisfied that this view cannot be sustained. The last Act gives a further power to pass by-laws under a new sub-section, which we think is to form one of the group of sub-sections, and that the added sub-section, equally with the original sub-sections, is to be followed by and subject to the general proviso as to the assent of the electors.

We cannot understand any other construction according to all the rules for interpretation of statutes, and apart from anything to be learned from authority, the natural construction of writing would certainly place the sub-section in such a position. "No debt shall be incurred for the purposes aforesaid, unless," &c. These purposes were set forth in the preceding sub-sections, and here it is

declared, not that a new section shall be added to the Act, but that a new sub-section shall be added to the 349th section.

It is, we think, to form part of that section, to be one of the "purposes" of the section, and must be subject to the general proviso as to "the purposes" aforesaid.

We can hardly concur that the Legislature could have designed, while forbidding the council from taking stock in a railway company, without the electors' consent, to permit the council to make a present to the company of any amount they might please, without such assent.

The charter of this company (33 Vic. ch. 36, sec. 7.) makes it lawful for any municipality to aid the company by loaning, guaranteeing, or giving money, by way of bonus, or other means; provided that no such aid, loan, bonus, or guarantee shall be given except after the passing of by-laws and their adoption by the ratepayers as provided by the Railway Act, and provided also that such by-law be made in conformity with the Municipal Acts.

Section 77, Railway Consol. Act Canada (ch. 66,) provides that no municipality should subscribe for stock, or incur any debt or liability under this Act, except by by-law passed with the assent of the electors, &c.

It is then argued that counties can pass any by-law for a debt not exceeding \$20,000 without such assent.

Sec. 227 enacts that every by-law (except for drainage under sec. 282) for raising upon credit any money, not required for ordinary expenditure and not payable within the year, must receive the assent of the electors, except that in counties the council may raise by by-law, without submitting the same to the electors, for contracting debts or loans, any sum or sums over and above the sums required for its ordinary expenditure, not exceeding in any one year \$20,000.

The decision of the first question seems to involve the second also.

If, as we think, the council cannot incur a debt by by-law to grant a bonus to a railway except with the ratepayers

assent, it seems to follow that the rule must equally apply to a bonus below as above \$20,000.

The power to pledge the credit of the county to the extent of \$20,000, without the electors assent, must, we think, be certainly confined to lawful purposes, and not to a grant to a railway company, which can only be done with such assent.

The case may be shortly summed up thus :

By-laws to raise money for all lawful purposes beyond the ordinary expenditure, and not payable within the year, must be submitted to ratepayers, except that counties may raise on credit money not exceeding \$20,000 in any one year without such submission.

But *all* aid to railways must be with the assent of the ratepayers ; therefore, *no* money can be given without such assent without reference to the amount.

GWYNNE, J.—If it had not been for the earnest manner in which Mr. Burton, for whose opinion I entertain the greatest respect, pressed his view upon us I should have thought the point to be free from doubt. The whole force of his argument was that the additional subsection, added by 34 Vic. ch. 30 sec. 6, to sec. 349 of the Municipal Institutions Act of 1866, must be read after the proviso at the end of the 4th subsection of section 349 ; from which he drew the conclusion that the additional subsection was not subject to the proviso. Now there is nothing in the language or structure of the sub-section enacted by 34 Vic. ch. 30 which requires that it should be so placed as contended for. The words of the 34 Vic. are, “The following subsection is added to section 349” of 29–30 Vic. ch. 51, “For granting bonuses to any railway, &c.” Now the 349th section, to which this new subsection is added, is as follows : “The council of every township, county, city, town, and incorporated village may pass bylaws.” Then follow four subsections stating the respective purposes, all beginning with the word, “For,” and stating the purpose. Now the additional subsection, enacted by 34 Vic., will read as well, whether placed

before the 1st subsection or between it and any of the others, as after the 4th; but assuming that, having regard to the time of its being passed being subsequent to the enacting of the original section it should be inserted, and read after the 4th, then its proper place appears to be before the proviso, thus keeping all the powers together. If it be read after the proviso, then the purpose declared in the new subsection would seem to be unnaturally and ungrammatically separated from the words at the commencement of the 349th section, so as to require their mental repetition before the words "For granting bonuses, &c.," to make the latter enactment sensible.

But, correctly speaking, the words at the end of the 349th section, commencing, "But no Municipal Corporation shall," &c., are no more part of the 4th sub-section of the 349th section of the Act of 1866 than of any other of the sections. Their true character is that of a proviso to limit a qualification upon,—or exception from,—the whole section. They are not a *part of*, but a qualification *upon*, the section. When then the Act 34 Vic. declares that "the following sub-section shall be added to section 349," the sub-section so added becomes *part* of the section, subject to all *its* incidents; it is inseparably annexed to a section which is subject to a proviso, and, being so annexed, must be subject to the proviso to which its principal, and of which it is a part, is subject. The by-law, therefore, here passed, for granting a bonus to a railway, must, to be operative, receive the assent of the electors in the manner required by the Municipal Institutions Act of 1866.

GALT, J., concurred.

Rule absolute to quash by-law, with costs.

ESCOTT V. ESCOTT.

Promissory note—Stamps—Pleading.

To an action by payee against maker of a promissory note, the plea was that there was not affixed thereto, at time of making, an adhesive stamp, or stamps of the required amount, or any stamps whatever, as required by the statute in that behalf:

Held, on demurrer, plea good.

DECLARATION, by payee of a promissory note against personal representatives of maker.

Plea, that there was not affixed to the said note, at the time of the making thereof, an adhesive stamp or stamps to the value of twenty-four cents, or any stamp whatever, as required by the statute in that behalf.

Demurrer, that the plea did not deny that the duty was paid on the said note, nor duty paid thereon subsequently to the making thereof, and for anything that appeared in the plea the note might be properly and sufficiently stamped otherwise than by the affixing of stamps.

Barker, for the demurrer, contended that the plea did not go far enough, but that it should also deny that the note was made on stamped paper, or that double stamps had been affixed by the payee. He referred to *Young v. Waggoner*, 29 U. C. 35; *Henderson v. Gesner*, 25 U. C. 184; *Bradley v. Bardsley*, 14 M. & W. 873.

Read, Q. C., contra, contended that the plea was good, and cited *McKay v. Grinley*, 30 U. C. 54; *Lowe v. Hall*, 20 C. P. 244.

GWYNNE, J., delivered the judgment of the Court.

We think that the plea sufficiently, in substance, alleges that the note was not stamped as required by law, either by having affixed thereto adhesive stamps or otherwise howsoever. But it is further objected that the plea is bad for not denying that the note was not stamped at some time subsequently to the making thereof.

Where a promissory note is made payable to a particular person named therein, such payee is a party to the note at the moment of its coming into existence or being made. Now the 8th section of the Act 27 & 28 Vic. ch. 4, requires the maker to affix the requisite stamp at the time of the making of the note, and the 9th section declares that if not so stamped the note shall be invalid and of no effect in law or in equity, except that any subsequent party to such instrument may, at the time of his becoming a party thereto, pay double duty, and the instrument shall thereby become valid. The Act of 1865 provides that no party to, or holder of, any promissory note, shall incur any penalty by reason of the duty thereon not having been paid at the proper time and by the proper party, provided that at the time it came into his hands it had affixed to it stamps to the amount of the duty apparently payable upon it, that he had no knowledge that they were not affixed at the proper time and by the proper party, and that he pays such duty as soon as he acquires such knowledge; and any holder of such instrument may pay the duty thereon and give it validity, under section nine of the Act 27 & 28 Vic., without becoming a party thereto. Now the payee of a note, being a party thereto at the time of the note coming into existence, cannot be "a subsequent party thereto," who in the terms of the 9th section of the Act of 27 & 28 Vic. may give a note validity by paying the double duty; and a holder, within the 4th section of the Act of 1865, who may give it validity by paying the duty, is a person who becomes holder without being a party—plainly, as in the former Act, a person subsequent to payee. It is suggested that if a note be made payable to a particular person, and kept in the maker's possession for some time after its date not delivered to the payee, and at a time subsequent to the date is delivered to the payee, he becomes then for the first time holder at a period subsequent to the making, and so within the Act of 1865; but in such a case we think that the promissory note is not made until the payee becomes a party thereto by delivery

to him ; and further, we think that, when the payee is plaintiff, and the plea sets up that the note was not duly stamped when it was made, that is a sufficient averment that it was not stamped when the plaintiff, the payee, became a party, and that such a plea is *prima facie* sufficient, unless the defendant pleads, if he can, any sufficient answer thereto.

Judgment for defendant on demurrer.

GREEN V. SWAN.

Insolvency—Deed of composition and discharge—Action by non-signing creditor—Pleading.

Held, on exceptions to the plea set out below, that a deed of composition and discharge, made without any proceedings in insolvency (before or after), without any assignee being appointed, and apparently wholly outside the Insolvent Court, cannot be a bar to non-assenting creditors.

DECLARATION. 1st count: Goods bargained and sold; goods sold and delivered; interest. 2nd count: Promissory note made by defendant for \$41.25, overdue.

Plea, that after the accruing of plaintiff's claim, and after September 1st, 1869, defendant, being then insolvent within the Insolvent Act of 1869, was indebted to divers persons, and thereupon a deed dated June 12th, 1871, was entered into between defendant, of first part, and certain persons named Leggat, McMullen, and McLaren, three of defendant's creditors, of second part, and the several other creditors of defendant, of third part, relating to defendant's liabilities and his discharge therefrom; and by said deed (setting out its provisions), &c., &c.; and a majority of defendant's creditors, who were creditors for \$100 and upwards, and who represented three quarters of defendant's liabilities, duly assented to said proposal and duly executed said deed.

Averment, and all things in plea recited happened before action; and plaintiffs were creditors, in respect of claim pleaded to, within meaning of Insolvent Act, and were bound by said deed as if parties thereto and had executed same.

Exceptions to plea: Plea set up an assignment, but did not shew provisions of Insolvent Act complied with by assignment having been made to official assignee, or assignee appointed by creditors. Plea did not allege defendant ever made an assignment as required by Insolvent Act, or that any proceedings taken by or against defendant, as insolvent, or that deed made in pursuance of the Act.

Not shewn that a confirmation of said deed had been obtained, or that defendant made an assignment, or that any proceedings taken for the compulsory liquidation of defendant's estate. Not shewn deed deposited with assignee, as contemplated by section 97, Insolvent Act.

The allegation that all conditions had been performed wholly unmeaning: plea should shew specifically in what manner plaintiffs were bound.

Merrit (of Guelph), for the exceptions to the plea, cited *Clapham v. Atkinson*, 4 B. & S. 722.

McMahon (of London), contra, cited *Ipstone's &c. Iron Co. v. Pattinson*, 2 H. & C. 829; *Ray v. Jones*, 19 C. B. N. S. 416; *Ex parte Stuart, re Waugh*, 9 L. T. N. S., 466; *Benham v. Broadhurst*, 3 H. & C., 472; *Shaw v. Massie*, 21 C. P. 273-4.

HAGARTY, C. J.—If we accede to the defendant's argument we establish a principle of vital consequence to traders and their creditors, virtually, as it seems to us, introducing a new doctrine into the insolvent law.

It is in substance that, without becoming an insolvent in fact, either by voluntary assignment or compulsory liquidation, and without coming under any of the machinery of law for the protection of creditors and prevention of fraud,

three-fourths of a man's creditors can release him from the claims of the remaining fourth.

Unless our Statute had given express authority to make an effectual composition binding on a minority, without bringing either the persons or the estate of the assignee under the act, we could not possibly hold that it can be done.

Such a proceeding has been sanctioned for some years past in England, and the last Act of 1869 (32 & 33 Vic., ch. 71) contains specific directions how it can be effected. Sec. 126 declares that "the creditors of a debtor unable to pay his debts may, *without any proceedings in bankruptcy*, by an extraordinary resolution, resolve that a composition shall be accepted in satisfaction of the debts due to them, &c." This resolution is to be passed at a general meeting, to be held in a prescribed manner by three-fourths in value of the creditors, and a majority in number, to be confirmed at a subsequent general meeting: the debtor must be present to answer inquiries, &c., and produce statement of assets. The resolution must be presented to the Registrar, who is to inquire if it has been regularly passed, and if satisfied, he shall register it and the statement of assets. The composition shall be binding on all creditors whose names and addresses and debts are shewn in the debtor's statement; and by section 127 the registration shall, in the absence of fraud, be conclusive evidence that the resolutions were passed, and the Act complied with.

The course of legislation on this subject is fully explained in chapter 33 of *Robson on Bankruptcy* (1870).

The power was first given in 1849. The Act "contemplated two kinds of arrangement under the control of the Court, and arrangements by deed independently of the Court."

By this Act arrangements by deed did not bind dissenting creditors, unless they comprised a cession by the debtor of all his property.

The Act of 1861 introduced new provisions. A *cessio*

bonorum was not required, and the majority could bind the minority, provided the deed was registered as provided by the Act. In 1868 an amended Act was passed, as it was found the Act of 1861 led to great abuses. The new Act "required, for the validity of composition deeds, a full discovery by the debtor of his property and liabilities, and made it compulsory on creditors to prove their debts by affidavit, and also gave enlarged powers to dissenting creditors to ascertain the real state of the debtor's property, as well as his debts and liabilities."

The last Act of 1869 is, in Mr. Robson's words, "liquidation by an arrangement under the Act, is in fact bankruptcy without a bankruptcy petition being presented, or an order of adjudication made. Compositions also are proposed to be effected by resolution of the creditors without a deed, but subject to the control of the Court."

The cases cited by Mr. Merritt from *Best & Smith* were under the Act of 1861, which also contains special permission for such a deed.

It appears very clear to me that no deed of arrangement or composition is authorized by our statute binding on non-assenting creditors, unless such deed, whether in fact executed in whole or in part before an assignment, or compulsory liquidation, and also the person of the debtor executing it, be brought fully under the operation and control of the Insolvent Act.

It can only be on the words of the 94th section that any question can arise: "and such a deed may be invoked and acted upon under this Act, although made either before, pending, or after proceedings, upon an assignment, or for the compulsory liquidation of the estate of the insolvent."

It seems to me that all that was meant by the words, "before, pending, or after," was, that if a debtor has proposed an assignment, and a deed has been prepared, and possibly executed by some of his creditors, the issuing of an attachment, or the execution of a voluntary assignment, should not defeat what had already been agreed upon, but that the deed might be proceeded with and acted upon as if made and executed after the entrance into insolvency.

The clause proceeds, "the whole subject to the exceptions contained in section 100." This section excepts a large class of debts of an insolvent from the effects of a discharge, and such debts cannot be reckoned in ascertaining whether a sufficient proportion of the creditors have voted upon, done, or consented to any matter or thing under the Act; and the creditor of any debt due by the insolvent as assignee, tutor, curator, trustee, executor, &c., may claim and accept a dividend thereon from the estate, without being by reason thereof in any respect affected by any discharge obtained by the insolvent.

As *all* deeds of composition and discharge are to be under this 100th section, it is not easy to see how its provisions can be complied with, if the deed be made without reference to the Insolvent Court at all, or without the debtor coming in under the Act. How are these excepted and protected claims by non-assenting creditors to be worked out? There will be no estate to prove on, no dividend to be looked for.

Again, under the 94th section it is provided that a deed of discharge, executed by the majority in number of those of the creditors of an insolvent who are creditors for \$100, and who represent three-fourths in value of the liabilities of an insolvent, subject to be computed in ascertaining such proportion, shall be binding, &c.

Who is the "Insolvent?" I do not think it is merely a person not able to meet his engagements. It must mean a person who has become an insolvent under the operation of the Act. If he be merely an ordinary trader, capable of becoming an insolvent under the Act, I see no means of ascertaining whether three-fourths of his creditors have assented or not. The deed may be presented to a creditor for execution, and he may know nothing of the state of the debtor's affairs, or the extent or nature of his liabilities. A man may thus obtain the consent of the required majority, and yet a non-assenting creditor may be able to shew an unanswerable case of fraud against him, sufficient to prevent his ever obtaining his dis-

charge from an Insolvent Court. Ample provision is made in the Act to enable such a creditor to oppose the discharge when the deed is lodged with the assignee. No such power is given, and no means of exposing the fraud seem to exist, if the debtor can bind non-assenting creditors by a deed executed and perfected without his becoming an insolvent under the Act.

The deed before us seems in substance an agreement to extend the time of payment of the debts for several years, certain property being conveyed, by way of mortgage, to trustees, to secure the payment.

It will be a most singular result if this can be done so as to bind objecting creditors, without the debtor coming under any of the provisions or liabilities of the Act. It is to all intents an arrangement to give time, on mortgage security, wholly outside the insolvent Act.

Sec. 101 provides for opposition by any creditor to the confirmation of the discharge, and prescribes certain conditions for its allowance. Secs. 102 and 103 bear on the same point.

We have held, in previous cases, that the discharge under the Act only bars scheduled claims. If defendant's contention prevail, there is no necessity for any schedule of debts, statement of assets, or discharge, or confirmation of discharge, by the Insolvent Court. Sec. 104 provides that, till the Court has confirmed the discharge, the burden of proof of the discharge being completely effected under the provisions of this Act shall be upon the insolvent.

For the reasons already given, I think the defendant has wholly failed to shew any discharge under the Act in question.

GWYNNE, J.—The 9th section of the Insolvent Act of 1864, enacted that a deed of composition and discharge, executed by the majority of creditors of the insolvent, required by the Act, should have the same effect with regard to the remainder of his creditors, and should be binding to the same extent upon him and upon them as if

they were also parties to it; "*and such a deed may be validly made either before, pending, or after proceedings upon an assignment, or for the compulsory liquidation of the estate of the insolvent.*" That section further enacted that the discharge therein agreed to, should have the same effect as an ordinary discharge obtained as thereinafter provided.

The Act of 1869 but slightly varies this language. The 94th section enacts that a deed of composition and discharge, executed by the like majority of creditors, should have the same effect as in the Act of 1864; but instead of the words, "*and such a deed may be validly made,*" &c., are inserted the words, "*and such a deed may be invoked and acted upon under this Act,* although made either before, pending, or after proceedings upon an assignment, or for the compulsory liquidation of the estate of the insolvent," and the clause of the Act of 1864, declaring what should be the effect of such a discharge, is omitted. The 97th section declares the *manner* in which such a deed is to be *invoked and acted upon* under the Act, namely, that it shall be deposited by the insolvent with the assignee in insolvency, who shall immediately give notice of such deposit by advertisement, whereupon any creditor of the insolvent may file with the assignee a declaration in writing that he objects to such composition and discharge, and thereupon the assignee shall abstain from taking any action upon such deed, until confirmed, as hereinafter provided; but if no opposition is made after such advertisement, then the assignee *shall act upon* such deed according to its terms. In case opposition be offered, then the manner of confirmation is provided by the 101st section. After filing the deed with the assignee, he is to give a notice in the form "N," set forth in schedule to the Act, of his intention to apply for a confirmation of the discharge effected thereby; and upon such application any creditor of the insolvent, *or the assignee*, may appear and oppose such confirmation upon, among other grounds specified, the grounds following, namely, of the fraudulent

retention and concealment, by the insolvent, of some portion of his estate or effects, or of evasion, prevarication, and false swearing, by the insolvent, upon examination as to his estate, or upon the ground that the insolvent has not kept an account book shewing his receipts and disbursements of cash, and such other books of account as are suitable for his trade; or that, having at any time kept such book or books, he has refused to produce or deliver them to the assignee, or that he is wilfully in default to obey any provision of this Act or any order of the Court or Judge; “and if any of the said grounds be proved, *the confirmation of his discharge shall be refused, and such discharge set aside and annulled.*”

Now from this it plainly appears that it was not the intention of the Legislature that a non-assenting creditor should be bound by the acts of the other creditors, although a majority, without giving him the fullest opportunity of bringing the conduct of the insolvent under the strictest enquiry, in accordance with the provisions of, and by the machinery of, the Insolvent Act, in the proceedings in insolvency. The act indeed provides that a deed made *before* proceedings in insolvency, may be *invoked and acted upon* in the manner above pointed out; but it is nowhere said that a deed of composition and discharge, executed by a majority of creditors, shall bind the rest, if the deed be made *wholly independently of* any proceedings in insolvency, or without the debtor being made an insolvent under the Act, which in effect is what the defendant contends for here. The effect, as it appears to me, therefore, is that a deed of composition and discharge, whether made before, or pending, or after proceedings under a voluntary assignment, or in compulsory liquidation, cannot be pleaded in bar of an action by a non-signing creditor, unless it be shewn to have been duly filed with the assignee in insolvency; and either not to have been opposed, or, if opposed, to have been confirmed; or perhaps the better decision is, that it cannot be pleaded in bar until confirmed, when if a valid composition within

Shaw v. Massie, and the cases there cited, it will constitute a bar.

The judgment will be that the plea is insufficient in law.

GALT, J.—The question raised by the pleadings in this case is, whether a deed executed by a debtor and assented to by three-fourths in number and value of his creditors, is binding upon any creditor who has not executed it, although the deed has been executed voluntarily by the debtor to an assignee chosen by himself, and no step has been taken, under the provisions of the Insolvent Act of 1869, to give effect to it.

The 2nd section of the Act of 1869, enacts as follows : “Any debtor unable to meet his engagements, and desirous of making an assignment of his estate, and any debtor who is required to make an assignment, as hereinafter provided, shall make an assignment of his estate and effects to any official assignee resident within the county or place wherein the insolvent has his domicile,” &c., &c.; and forthwith, upon the execution of the deed of assignment to him, a meeting of the creditors of the insolvent, for the appointment of an assignee, shall be called by the interim assignee, to be held at the place of business of the insolvent, within a period not exceeding three weeks from the execution of the deed of assignment. The 3rd section then provides for the calling of the meeting, which shall be called by advertisement, and previous to such meeting the interim assignee shall prepare and shall then exhibit statements shewing the position of the affairs of the insolvent, including an inventory of his estate and effects; and the insolvent shall assist in the preparation of such statements and of the said schedule, and shall attend at such meeting for the purpose of being examined on oath touching the contents thereof, and touching his books of account and his estate and effects generally; and at such meeting he shall file a declaration under oath, stating whether or no such statements and schedule are correct, and if incorrect, in what particulars; and the interim assignee shall

also produce at such meeting the insolvent's books of account, and all other documents and vouchers, if required so to do by any creditor. The 5th section provides for giving notice to all creditors. The object and intent of the foregoing sections are that a conveyance of *all* the estate of the insolvent shall be made to the assignee, and that every possible information shall be furnished to each creditor. The 34th section has reference to the first meeting of creditors, which shall be held for the appointment of an assignee, either on a *voluntary assignment* or in compulsory liquidation, or at any subsequent meeting. The 35th section (which is the first that has any reference to a composition) enacts, if at such meeting the insolvent shall make an offer of composition, and such offer be approved by the creditors, they may make such order as they may deem expedient, either for suspending the disposal of the estate, and all or any proceedings tending thereto, for such time as may be fixed by such meeting, or for any other purpose.

It appears to me that the intention of the Legislature, as shewn by the 35th section, was that an offer of a composition, on the part of a debtor, must be made at a meeting of creditors, and at a time when they shall be in possession of a full statement of the affairs of the insolvent, verified by his oath, and after an assignment of all his estate and effects shall have been made to an assignee appointed by them, so that they shall have an opportunity of forming their own opinion as to whether the offer of composition is reasonable, and one which ought to be accepted. No such meeting was called in the case now before us, nor was any such assignment made; and therefore, in my opinion, the deed now in question before us cannot be regarded as a composition deed under the Statute, unless there are other provisions in the Act which will give it validity. The defendant relies upon the 94th section for this purpose. That section is as follows: "A deed of composition and discharge, executed by the majority in number of those of the creditors of an insol-

vent who are respectively creditors for sums of one hundred dollars and upwards, and who represent at least three-fourths in value of the liabilities of the insolvent, subject to be computed in ascertaining such proportion, shall have the same effect with regard to the remainder of his creditors, and be binding to the same extent upon him and upon them, as if they were parties to it; and such a deed may be invoked and acted upon under this Act, although made either *before, pending, or after* proceedings upon an assignment, or for the compulsory liquidation of the estate of the insolvent." The 95th section enacts that such deed of composition and discharge may be so made in consideration of a composition payable in cash or on terms of credit, or partially for cash and partially on credit, &c., &c.; and such deed may contain instructions to the assignee as to the manner in which he is to proceed and to deal with the estate and effects of the insolvent subsequent to the deposit of such deed with him, which instructions shall be obeyed by the assignee; but if such discharge be conditional upon the composition being paid, and the deed of composition and discharge therein contained should cease to have effect, the assignee shall immediately resume possession of the entire estate and effects of the insolvent, in the state and condition in which they shall then be, &c., &c.

The 96th section relates to a reconveyance by the *assignee* to the insolvent, made in conformity with the terms of a deed of composition and discharge. Sec. 97 has an important bearing upon the question now before us. If the insolvent procures and deposits with the assignee a deed of composition and discharge, duly executed as aforesaid, the assignee shall immediately give notice of such deposit by advertisement, and if opposition to such composition and discharge be not made by a creditor within three juridical days after the last publication of such notice, by filing with the assignee a declaration in writing that he objects to such composition and discharge, the assignee shall act upon such deed of composition and

discharge according to its terms; but if opposition be made thereto within the said period, or, if made, be not withdrawn, then he shall abstain from taking any action upon such deed until the same has been confirmed as hereinafter provided. It appears to me that the effect of the foregoing sections, 94, 95, 96, and 97, is to render it necessary, before a deed of composition and discharge is binding under the Statute, that an assignment must be made to an official assignee, and that the construction to be placed upon the 94th section is, that effect may be given to a deed of composition and discharge, although it has been signed before an assignment, to the same extent as if it had not been executed until after; but that it must be laid before a meeting of the creditors of the insolvent, as provided for in the 35th section. It is manifest from the 97th section, that any creditor has a right to be heard in opposition to a deed of composition and discharge, although it has been executed by the majority necessary to give it validity, and this could not be done except through the intervention of an assignee. To uphold the contention of the defendant in this case, viz., that the assent of the required number of creditors is all that is necessary to a deed of composition and discharge would be to set aside the provisions of this very important clause of the Act. I am therefore of opinion that the exceptions to the plea in this case are valid, and that our judgment must be for the plaintiffs.

Judgment accordingly.

ROWE V. CORPORATION OF ROCHESTER.

Highways—Injury caused by draining, and felling timber—Liability of municipality—Pleading.

Held, on demurrer to the pleas set out below, that a municipality cannot, for the purpose of repairing or draining a highway, commit an injury to private property, by collecting and conveying water to it, and shelter themselves from liability under their statutable obligation to keep the road in repair :

Held, also, that a similar statutable duty of opening the road upon which they grew, was no answer to an action for injury caused to plaintiff's land by the felling of trees, accompanied by the allegation that in so opening the road a portion of the trees, in being cut and felled, necessarily reached to and fell upon plaintiff's land, but doing said land, &c., no unnecessary and no material injury, &c.

Declaration, 1st count. That defendants wrongfully made and deepened, widened and enlarged, certain ditches on both sides of and across the road on one road, and other ditches on both sides of and across the road on one road, and other ditches on both sides and across another road between lands of the plaintiff, &c., and wrongfully, &c., and by their negligence by means thereof brought upon plaintiff's land large quantities of water, and turned the course of certain water courses upon plaintiff's lands, whereby his grass, soil, &c., was injured.

2nd count. That for some time since the defendants so deepened, widened, &c., the ditches, and permitted and allowed them to continue open, whereby water was thrown on plaintiff's lands, &c.

Plea, to both counts, setting out defendant's statutable obligation to keep the road in repair, &c. ; that the road was out of repair, and defendants, in performance of their duty, necessarily made, cut, deepened, widened and enlarged the ditches for the purpose and with the intent of keeping said road in proper repair, and in so doing no unnecessary injury or damage was done or caused to plaintiff's land, which were the grievances complained of, &c.

3rd count. That defendants, in opening the line of road, cut and felled timber and trees growing thereon so negligently that the tops and a large quantity of the bodies of

the trees and timber fell into and upon plaintiff's land, whereby his growing timbers were destroyed, and part of the lot was damaged and encumbered.

Plea, setting out their statutable duties and liabilities as to the road ; that this road had to be opened under a by-law passed by them ; that in so doing a portion of the standing trees, " in being cut and felled, necessarily reached to and fell upon plaintiff's land, but doing and causing the said land, and the timber thereof, no unnecessary and no material injury or damage, *quæ sunt eadem*, &c.

Demurrer, that the pleas admitted injury and damage to plaintiff, without sufficient excuse or any proceedings for compensation.

Prince, Q. C., in support of the demurrer, referred to *Rowe v. Corporation of Rochester*, 29 U. C. 590.

Harrison, Q. C., contra, cited *Regina v. Municipal Council of Perth*, 14 U. C. 156 ; *Brown v. Municipal Council of Sarnia*, 11 U. C. 87 ; *Perdue v. Corporation of Chinguacousy*, 25 U. C. 61 ; *Ede v. Scott*, 7 Ir. C. L. Rs. 607 ; *Angell, Watercourses*, 6 ed. ch. 4, sec. 108 ; *Dunn v. Birmingham Canal*, L. R. 7 Q. B. 244, 260.

HAGARTY, C. J., delivered the judgment of the Court.

If we hold the plea to the first and second counts good, it must be on the broad ground that the municipality, for the purpose of repairing or draining their road, may commit any injury to a man's land in throwing water upon it, without having to make him any compensation ; that they may collect all the water and throw it on his land as a reservoir, so long as they do it for the purpose of improving the road.

No power is conferred upon them to do any such injurious act. No provision is made for compensating any person injured by this performance of their statutable duties. In the absence of any such power it seems to us impossible to accede to the defendants' argument. It may be quite possible that the defendants have the right to

raise or lower the level of this road, and that no remedy is given to persons injured or inconvenienced thereby; but it is a totally different matter when the acts complained of amount to an interference with the natural flow of water, or to the gathering of scattered waters into one course, and causing them to flow upon adjoining lands.

The question, however, seems not open to discussion, unless a Court of Error interpose.

A case has already been tried between these parties, the declaration charging the injuries almost in the same language as in the first count here, except that negligence is also charged in this action. Not guilty by statute was pleaded, and, after verdict for the plaintiff, the Court affirmed the right to recover. Wilson, J., says, "I cannot conceive what right they can have to drain all the surface water of any particular area against the land of another, and to drain it in part or altogether to the destruction of his farm, although they may have done their work in the most skilful and scientific manner, and though it may have been absolutely necessary to drain in this manner for the making of a good road."

It is unnecessary to notice the earlier cases, as they appear in the case cited. Here the additional charge of negligence is made. On the broad ground of authority we must hold the plea bad.

Notwithstanding the great relaxation of stringency in the construction of pleadings, I incline to think the plea open to objection, as not confessing anything which it professes to avoid. As in *Perdue v. Corporation of Chinguacousy* (1865), the question may be asked, what are the grievances to which the *quæ sunt eadem* of this plea can apply?

The case, however, does not turn upon this objection.

The plea as to the timber is, I think, still more objectionable. If, in felling timber to clear the road, trees accidentally, or even necessarily, chanced to fall on plaintiff's land, no right would be conferred to leave them encumber-

ing his property. The defendants could readily have drawn the tree tops off plaintiff's land, and most likely could have done so without trespassing or going thereon. I see no legal bar to plaintiff's right. The plea is most singularly worded. It says that no unnecessary, *and* no material injury was done to plaintiff's land. What does this mean? A confession of some necessary injury, or a traverse of any material or appreciable injury? It seems unfortunate that parties will persist in abandoning or disregarding the plain rules of pleading, and trying experiments in new modes of expression. We have happily been emancipated from many absurd intricacies in pleading; but the leading rules can rarely be disregarded without involving us in constant doubt as to what is really meant, and is really in issue. The old rules, as to confession and avoidance, seem to me still to be eminently calculated to insure certainty and precision in statement. Every plea to a declaration, in substance, generally amounts to a direct denial of what is charged, or an admission and reason for non-liability. I make these remarks as it was pressed on us in argument that pleas are not to be judged by antiquated rules, but by the clearer intelligence of a more enlightened age.

I am sincerely diffident in pronouncing any opinion at present as to any technical point of pleading.

I decide this case on the substantial defence.

Judgment for plaintiff on demurrer.

IN RE MORELL V. THE CITY OF TORONTO.

Municipal corporation—Assessment for street watering—By-law necessary—Resolution quashed.

There must be a *by-law* for the necessary assessment, for the watering of a street, passed *subsequently to, and consequent upon*, the presentation of the required petition therefor, and after the fullest opportunity given to any ratepayer to object to its passage, and a *resolution* for that purpose, passed by a municipal corporation under a *by-law* antecedently made, and which authorized this mode of proceeding, instead of by *by-law*, was therefore quashed, but without costs, as the applicant had been one of the petitioners, was well aware of its object, had enjoyed the benefit of the resolution, and had been dilatory in complaining.

IN Hilary Term last, *Read*, Q. C., obtained a rule *nisi* to quash a resolution of the Council of the Corporation of the City of Toronto, passed upon the 19th of June, 1871, or so much thereof as related to Queen Street, from John Street to Spadina Avenue.

The resolution was in the words following: "In compliance with the petitions for street watering, of the freeholders and householders residing in the undermentioned localities, which have been reported on by the City Clerk to the Council, which petitions are as follows, viz.: Queen Street, from John Street to Spadina Avenue (here followed the enumeration of nine other parts of streets), be it therefore resolved that a special rate be levied on the ratable property of the above mentioned localities, for the purpose of watering the same, the said rate to be estimated on the contract price for the same, and to be levied, collected and applied, in compliance with section number 4, of *by-law* number 481."

This *by-law* number 481, which was produced, appeared to be a *by-law* passed on the 26th October, 1868, entitled "A *by-law* to authorize a special assessment for the purpose of watering the streets." It recited the powers conferred upon the municipal councils of cities, by 29 & 30 Vic. ch. 51, sec. 340, sub-sec. 2, and that it was inexpedient and inconvenient to pass a separate *by-law* for each particular locality (under that section), and it enacted "That whenever a petition signed by at least two-thirds of

the freeholders and householders resident in any street or portion of street, clearly defined between cross streets, square, alley, or lane, representing in value one half of the ratable property therein, should be presented to the municipal council of the City of Toronto, praying the said municipal council to assess the inhabitants of the said street or portion of street, square, alley, or lane, for the purpose of watering the same, it should be the duty of the Clerk of the said municipal council to lay before the said municipal council, at the regular meeting next following the presentation of such petition, a statement shewing the assessed value of the property and the number of persons assessed on such street, portion of street, square, alley, or lane, together with the amount represented by such petitioners, and the number of such petitioners."

Sec. 3: "That at such next regular meeting, or any subsequent meeting of the said municipal council, the said municipal council may, by resolution, in the form annexed to their by-law, resolve to levy a rate upon the ratable property of such street, or portion of street, square, alley, or lane, for the purpose aforesaid, which resolution shall, when adopted by the said municipal council, be read and construed as forming part of this by-law, and thereupon it shall be the duty of the Board of Works of said city, and the said Board of Works are hereby authorized and required to contract for the watering of such street or portion of street, square, alley, or lane, and to direct the payment of the contractor out of the rate so resolved to be levied as aforesaid, expressly limiting the liability of the said city to the amount to be realized by the rate to be levied as aforesaid."

Sec. 4: "That the rate so resolved to be levied as aforesaid, upon the ratable property of any street, or portion of street, square, alley, or lane, shall be levied and collected from the freeholders and householders rated on such street or portion of street, square, alley, or lane, in the same manner and under the same powers, authorities, and directions as any other assessment now is authorized to be levied and collected."

The grounds upon which the resolution was sought to be quashed were, that the petition upon which said resolution was founded, being a petition dated April 26th, 1871, did not request or pray the said council to assess the inhabitants of said Queen Street, or portion of Queen Street, for the purpose of watering the same, and was not in accordance with section 2, of by-law 481; and 2nd, that it was not competent for the council of said city to pass a resolution, or the said resolution, for the levying of a local rate; but the same could only be done by by-law, and the by-law should have reference, not to several, but to separate localities.

The petition was as follows: "Toronto, April 26th, 1871, "To the Mayor and Corporation of the City of Toronto, We, the undersigned ratepayers of the western part of the city, from John Street to Spadina Avenue, on Queen Street, do pray that you will water the *streets* during the summer months of 1871."

C. Robinson, Q. C., shewed cause.

Read, Q. C., contra, referred to *Regina v. Town Council of Lichfield*, 4 Q. B. 893; *Stevens v. Duffty*, 4 Burr. 2260; *Regina v. Mayor &c., of Warwick*, 8 Q. B. 926; *Dunston v. Imperial Gas Light &c., Co.*, 3 B. & Ad. 125; *Rex v. Harrison*, Burr. 1325; *Rex v. Coopers Co., Newcastle*, 7 T. R. 548.

GWYNNE, J., delivered the judgment of the Court.

The clause of the Act 29 & 30 Vic., ch. 51, sec. 340, sub-sec. 2, under which the municipal council is authorized to impose a rate for the purpose of watering streets, provides that, "The council of every city, town, and incorporated village, may pass by-laws for raising, upon the petition of at least two-thirds of the freeholders and householders resident in any street, square, alley, or lane, representing in value one-half of the ratable property therein, such sums as may be necessary for sweeping, *watering*, or lighting the street, square, alley, or lane, by means of a

special rate on the ratable property therein; but the council may charge the general corporate funds with the expenditure incurred in such making or repairing, or in such sweeping, watering, or lighting, as aforesaid."

The 194th section of the Act provided that, "In case any person rated on the assessment roll of any municipality or of any locality therein, objects to the passing of a by-law, *the passing of which is to be preceded* by the application of a certain number of the ratable inhabitants of such municipality or place, he shall, on petitioning the council, be at liberty to attend in person, or by counsel, or attorney before the council, at the time at which the by-law is intended to be considered, or before a committee of the council, appointed to hear evidence thereon, and may produce evidence that the necessary notice of the application for the by-law was not given, or that any of the signatures to the petition are not genuine, or were obtained upon incorrect statements, and that the proposed by-law is contrary to the wishes of the persons whose signatures were so obtained, and that the remaining signatures do not amount to the number, nor represent the amount of property necessary to the passing of the by-law; and, Sec. 195, "If the council is satisfied upon the evidence that the application for the by-law did not contain the names of a sufficient number of persons whose names were obtained without fraud and in good faith, and who represent the requisite amount of property, and are desirous of having the by-law passed, or if the council is satisfied that the notice required by law was not duly given, the council shall not pass the by-law."

Now from these sections it is very plain that what the Legislature authorized was that the power of the council to impose a rate for the purpose indicated was to be exercised only by by-law, and that such by-law should in every case be passed subsequently to, and consequent upon, the presentation of the required petition praying the particular by-law to be passed, and after the fullest opportunity should be given to every ratepayer, to be affected by the

by-law, to object to its being passed. When, therefore, the municipal council of 1868 affected to pass the by-law number 481, and to enact thereby that what the Legislature had directed should be done only by by-law, should be done by a resolution; and when it affected to declare that a resolution which the council, which might be in existence ten or twenty years subsequently, might pass, should be read and construed as part of a by-law passed in 1868, the council exceeded its jurisdiction, and usurped the powers and authority of the Legislature to which it owes its origin and all its powers. It follows, as a consequence, that by-law 481, though not quashed, is purely void, and cannot give the intended vitality to a resolution passed three years afterwards. The rate, therefore, which is objected to, having been affected to be imposed by a resolution and not by by-law, has not the sanction of law. It appears that the person applying now to quash the resolution, was himself one of those who signed the petition upon which the resolution was passed, and that he was well aware that the intention was to defray the expense by a special rate, and that he enjoyed the full benefit of having the street watered during the summer months, and made no complaint until long after he became aware of the rate charged against himself. While, therefore, we feel bound to accede to his motion, we do not feel called upon to give him any costs of this application, nor upon this application do we do more than quash so much of the resolution as relates to Queen Street, from John Street to Spadina Avenue.

Resolution quashed, without costs.

PENDER V. BYRNE.

Plea of puis darrein continuance—Waiver of other pleas on record—New trial.

Held, on the authority of *Dunn v. Hill*, 11 M. & W. 470, &c., that the plea of *puis darrein continuance* operates as a waiver of all pleas remaining on the record yet to be tried; and it, therefore, appearing in this case, that if the plea of not guilty, which had been pleaded before the plea of *puis darrein continuance*, had remained on the record, the plaintiff must have been nonsuited, a new trial was granted unless plaintiff would consent to reduce his verdict to nominal damages.

The declaration contained seven counts for malicious arrest, on a charge of felony, trespass and false imprisonment, and slander, to which the defendant pleaded not guilty, on which issue was joined. Afterwards the defendant, without leave, pleaded a release by deed, *after the last pleading*, from all the causes of action and costs of suit.

To this plea the plaintiff replied, 1st, *Non est factum*; 2nd, That the plaintiff was induced to execute the deed by fraud, covin, misrepresentation, undue influence, and unfair means of the defendant, and others, in collusion with him; and 3rd, that when the plaintiff executed the alleged deed in the plea mentioned, he was so drunken, intoxicated, and under the influence of liquor, and thereby so entirely deprived of sense, understanding, and the use of his reason, that he was unable to understand his meaning, object, nature or effect of the said alleged deed, or to contract thereby, as the defendant then well knew; and the defendant rejoined, taking issue.

The cause came down for trial before Wilson, J., who held that the plea of release so pleaded operated as a withdrawal of the plea of not guilty. In the course, however, of the evidence upon the issues joined on the plea of release it appeared that if the plea of not guilty had remained on the record, the defendant must have succeeded, and he was therefore of opinion that the plaintiff could only recover nominal damages, if any. The jury, however, rendered a verdict for the plaintiff on the 1st, 5th, and 6th counts, that is, on one of the counts for malicious prosecution, trespass and slander, with \$100 damages, and for the defendant on the other counts.

Harrison, Q. C., in Hilary Term last, obtained a rule *nisi* to set aside the verdict and for a new trial upon the ground that the verdict was against law and evidence, and the weight of evidence, and because substantial, in place of nominal damages only, were given, contending that the plea of not guilty was still on the record and that defendant should have had a verdict on it. He referred to *Barber v. Palmer*, 1 L. Ray. 693; *Godson v. Robinson*, 3 Pr. 366.

K. McKenzie, Q. C., shewed cause, citing Bullen & Leake (ed. of 1863) 388, 557; Arch. Pr. 12 ed. II. 922; *Wagner v. Imbrie*, 6 Ex. 380; *Dunn v. Hill*, 11 M. & W. 470; *Cobbold v. Chilver*, 4 M. & G. 62; *Appleton v. Lepper*, 20 C. P. 138; *Grove v. Wath*, 2 Sch. & L. 670.

GWYNNE, J., delivered the judgment of the Court.

Upon the authority of *Dunn v. Hill*, 11 M. & W. 470; *Wagner v. Imbrie*, 6 Ex. 380, and the text books Bullen & Leake and 2 Archd. Prac., we must hold the plea of *puis darrein continuance* to operate as a waiver of all pleas remaining on the record yet to be tried. The same reason for the rule, as explained by Parke, B., in *Wagner v. Imbrie*, exists now as formerly, namely, that there is no statute which enables a defendant to plead one plea at one time and another at another time in different states of the record. If both should be regarded as still continuing on the record the Rules of Court made to give effect to the provisions of the Common Law Procedure Act would be insensible. The 51st rule provides that, when issues in law or fact are raised, the costs of the several issues both of law and fact will follow the judgment. Now, to entitle a party to costs under that rule, there must be a judgment upon the issues. But the 23rd of the Rules of Pleading, enacted at the same time, provides that, when a plea is pleaded with an allegation that the matter of defence arose after the last pleading, the plaintiff shall be at liberty to confess such plea and shall be entitled to the costs of *the cause* up to the time of pleading such plea, provided that this rule shall not apply to the case of such plea pleaded by one or more only

of several defendants. Now the plain meaning of this is that, where there is but one defendant, and such a plea pleaded which is confessed by plaintiff, the plaintiff shall have the whole costs of the cause, which he only could have upon the basis that the former pleas have no longer to be tried or brought to judgment so as to determine the costs of them under the other rule. In this case, however, instead of confessing the plea, the plaintiff replied, 1st, *non est factum*. 2nd, that the plaintiff was induced to execute the deed by fraud, covin, misrepresentation, undue influence, and unfair means of the defendant, and others in collusion with him, and 3rd, that when the plaintiff executed the alleged deed in the plea mentioned, he was so drunken, intoxicated, and under the influence of liquor, and thereby so entirely deprived of sense, understanding, and the use of his reason, that he was unable to understand the meaning, object, nature, or effect of the said alleged deed, or to contract thereby, as the defendant then well knew.

The jury have found the issue raised by the third replication in favor of the plaintiff, and have rendered a verdict for him on the 1st, 5th, and 6th counts, \$100 damages.

In view of what it was necessary for the plaintiff to establish in support of his 3rd replication to the plea, we cannot fail to observe that the finding of the jury is not reconcilable with a due appreciation of the weight of the evidence; but we do not proceed upon this ground, because in the course of the evidence, it appeared to the learned Judge, and in the opinion formed by him we entirely concur, that if the plea of not guilty had remained upon the record, to be tried after the filing of the plea since the last pleading, the plaintiff must have been nonsuited. If, instead of pleading the release as a plea "*puis darrein*," the defendant had asked leave to withdraw the plea already filed and to plead anew, he might then have pleaded again not guilty, together with the release, as a plea *to the further maintenance* of the action, and then both pleas would have been properly on the record, and the defendant must have succeeded. Under the circumstances we are of opinion that

if this verdict can be permitted to stand for the plaintiff at all, it must be for nominal damages only. Unless, therefore, the plaintiff will consent to the verdict being reduced to nominal damages, there must be a new trial between the parties.

The circumstances of the case, as appearing in the evidence, warrant us, we think, in the event of the rule for new trial being required to be issued, in adding to that rule leave to defendant to alter the plea *puis darrein* into a plea to the further maintenance of the action, and to amend the date of the pleas of not guilty and the added plea to the same day, namely, the date of the added plea, as suggested in the note to Bullen & Leake, 389.

CAMERON V. MILLOY.

Action for injury to the person—Death of defendant—Suggestion of death.

Plaintiff sued defendant, owner of a steamer carrying passengers for hire, charging that plaintiff was received by defendant as a passenger from T. to N., for safe carriage, for reward, but defendant did not safely carry plaintiff, who was in consequence seriously injured, &c. There was a second count, charging it to have been defendant's duty to stop at the wharf at N., and to provide safe and proper gangways, but that defendant refused to stop, to enable plaintiff to land in safety, and neglected to provide a safe gangway, or other means, and a reasonable opportunity for plaintiff to land, in consequence of which plaintiff, in landing at said wharf, was thrown down and injured, &c.

After the commencement of the action defendant died, and plaintiff entered a suggestion on the record, but, *Held*, that the action died with defendant, and could not be revived against his executor.

Anderson obtained a rule *nisi* to strike out a suggestion, entered on the record in this cause, of the death of the defendant, on the ground that the action did not survive against the executors. The suggestion was entered on 23rd December, 1871. The pleadings were as follow :

Declaration. 1st count: That defendant owned a steamer carrying passengers, for reward, from Toronto to Niagara, and plaintiff was received by defendant as a passenger, to be safely carried, for reward, from Toronto to

Niagara; yet defendant did not safely carry plaintiff, but so negligently, &c., conducted himself, that plaintiff was seriously injured, and prevented from attending to his business as a barrister, &c.

2nd count: That defendant owned a steamer carrying passengers from Toronto to Niagara; that plaintiff was lawfully, and with defendant's assent, a passenger for hire on board, and it was defendant's duty to navigate with reasonable care, &c., and to stop at wharf at Niagara to enable passengers to land in safety at the wharf, and to provide safe and proper gangways, &c., for passengers, &c.; yet defendant, neglecting his duty, did not navigate carefully, and neglected and refused to stop the vessel at the wharf at Niagara, to enable plaintiff to land in safety, and neglected to provide a safe gangway, or other means, and a reasonable opportunity for plaintiff to land; and in consequence, plaintiff, in landing at said wharf, was thrown down and injured, unable to attend to his business, &c., and incurred expense.

Plea, not guilty.

H. Cameron shewed cause and contended that the application was too late, as it should have been made during the term following the entry of the suggestion; that the affidavit and rule were styled in the wrong cause since the entry of the suggestion; and that the action did survive, for that the maxim "*actio personalis*," &c., did not apply to relieve the executors, to the extent of the assets in their hands, from responsibility for damage arising from a breach of their testator's contract to carry safely for reward, which was the foundation of this action. He cited *Williams' Executors*, 1591; *Goodman v. Ball*, 10 C. P. 174; *Wheatley v. Lane*, 1 Wms. Saund. 216a, note 1; *Dutton v. Lailey*, 18 Hill, (Mass.) 285; *Bac. Ab. Ex.* 2.

Anderson, contra, argued that the cause of action did not survive, referring to *Broom's Legal Maxims*, 874-881; *Ireland v. Champneys*, 4 Taunt. 804.

HAGARTY, C. J.—It is singular that no case was cited in argument decisive of the question whether the death of the defendant, in a case like this, does or does not put an end to the cause of action; nor have I been able to find any express decision in any of the best text books to which I have referred.

Broom's Legal Maxims (Ed. 1864, page 880, under the head of *actio personalis moritur cum personâ*) says: "For a tort committed to the person, it is clear, then, that at common law no action can be maintained against the personal representatives of the tortfeasor; nor does the Statute 9 & 10 Vic. ch. 93 (Lord Campbell's Act), supply any remedy against the *executors or administrators* of the party who, "by his wrongful act, neglect, or default," has caused the death of another; for the first section of this Act renders that person liable to an action for damages, "who would have been liable if death had not ensued"; in which case, as already stated, the personal representatives of the tortfeasor would not have been liable." Our Act, Consol. Can. ch. 78, does not enlarge the remedy.

The class of cases most frequently affected by this Act, are of passengers killed while being carried on railway trains or public conveyances by land or water, and the declaration is framed generally, in substance, like the present, a tort founded on contract. As Willes, J., says, in the elaborate case of *Alton v. Midland Railway Co.* (19 C. B. N. S. 241): "This is a case in which there could have been no duty, but for the contract to carry safely in consideration of a certain payment. The passenger purchases the duty, which the law says arises out of the contract, and he has his election to sue upon the contract, or for the breach of the duty founded on the contract. I asked, in the course of the argument, if the executor could sue upon such a contract as this, and Mr. Keene said he thought not. I am disposed to think the answer given right. It is probably like a promise of marriage, which not being within the Statute, Ed. IV., *moritur cum personâ*. But, suppose the personal estate sustained injury through the defendant's

breach of duty, as, if he had taken a quantity of luggage with him, which had been lost or damaged, it is clear his executor might have sued for that damage," citing *Knight v. Quarles* (2 B. & B. 102), an action against an attorney for negligence, in which the Court gave judgment in favor of the action, on demurrer, holding that an express promise was averred, a breach in lifetime of intestate, and an injury to his personal property; that, though the intestate might have brought case or assumpsit at his election, assumpsit was the only remedy for the administrator." Willes, J., observes, "The action was there held to be maintainable at common law, because the substance of the matter was contract."

In the case before us the action is sought to be *against* the representatives, for an injury *to the person*. This seems to rest on a different footing. The point seems to be clearly put in *Hambly v. Trott*, administrator, (1 Cowp. 373). The action was trover against an administrator, for a conversion in his deceased testator's lifetime. Plea, testator not guilty. It was moved to arrest judgment after verdict for plaintiff, on the ground that it was a personal tort dying with the person. Lord Mansfield: "The fundamental point to be considered is whether, if a man get the property of another into his hands, it may be recovered against his executors, in the form of an action of trover. * * After reviewing the authorities, he holds the action in this form will not lie; that the form of the plea is decisive. When the plea must be, as in this case, *not guilty*, no action can lie against the executor. Upon the face of the record the cause of action arises *ex delicto*, and all private criminal injuries or wrongs, as well as all public crimes, are buried with the offender. * * If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, &c., then the person injured has only a reparation for the *delictum* in damages to be assessed by a jury; but where, besides the crime, property is acquired which benefits the testator, there an action for the value of the

property shall survive against the executor. * * So far as the tort itself goes, an executor shall not be liable * * but so far as the act of the offender is beneficial, his assets ought to be answerable and his executor therefore be charged. * * Another form of action may be brought, as an action for money had and received."

The subject is fully discussed in the notes, 1 *Wms. Saund.* 239 (ed. 1871): "If goods, &c., taken, continued still in specie in the hands of the wrong-doer, or of his executor, replevin or detinue would lie, for or against the executor, to recover back the specific goods; or, in case they were consumed, an action for money had and received, to recover the value." So though an action on the case is not maintainable against the executor of a carrier, yet an action of assumpsit is.

Executors of an inn-keeper cannot be sued in tort for the loss of a guest's goods (unless under Stat. 3 & 4, Wm. IV. ch. 42). He may be sued on an implied assumpsit: *Morgan v. Rarey* (2 F. & F. 283).

This last mentioned Statute is in substance like ours, U. C. Consol. Stat. ch. 78, sec. 2, which enacts that, in case any deceased person, within six months next previous to his decease, committed a wrong to another person in respect of such other person's real or personal property, the person so wronged may, within six months, &c., sue in trespass, or trespass on the case, according to the nature of the wrong, &c., the damages to be payable as simple contract debts.

The Statute 4 Edwd. III., ch. 7, *de bonis asportatis in vitâ testatoris*, enabled executors to recover damages against trespassers in like manner as they, whose executors they be, should have had if they were living.

Again, *Wms. Saund.* 245, F.: If an executor can shew damage to the personal estate, in breach of an express or implied contract, he may sue, &c., as against a coach proprietor, upon a breach of contract for a safe conveyance by a coach, where the deceased sustained an injury by a fall, by which his means of improving his personal estate were

destroyed." The converse of the proposition was not discussed. In 2 *Williams* on Executors (ed. of 1867), 1596, the same general view is expressed: "When the declaration implies a tort done, either to the person or property of another, and the plea must be not guilty, the rule is *actio personalis moritur*, &c.; and if the person by whom the injury was committed dies, no action of that kind can be brought against his executor or administrator." "Again, an action on the custom of the realm, against a common carrier, is for a tort and supposed crime, and the plea is not guilty; therefore, at the common law, it will not lie against the carriers' executor. But an action of *assumpsit* will lie against them upon the very same cause." The effect of the Statute 3 & 4 Wm. IV., ch. 42, sec. 2, is then discussed as to wrongs in respect of property, real or personal.

I am of opinion that the present action died with the defendant Milloy, and that no suggestion can be properly entered on this record.

It seems to be a case for a purely personal injury, whatever be the mere form of the declaration, and it falls within the definition of Lord Mansfield, and is quite distinct from a case in which an injury was done to the plaintiff's property, so as to charge the assets of the deceased.

GWYNNE, J.—Mr. Cameron's contention was, that the maxim *actio personalis moritur cum personâ*, does not apply to *relieve* the executors of a testator, in so far as they have assets, from liability for an injury occasioned to a plaintiff by a breach of their testator's contract to carry safely for reward, the cause of action being, as he contends in substance, founded on a contract to carry for reward.

His contention, I understood to be, that if the declaration had been, as it might have been, framed upon the contract charging the injury sustained by the plaintiff as having been the consequence of the breach of contract, in such case, the estate of the person whose breach of contract,

committed in his life time, caused the injury complained of, would have been liable to recompense that injury; but that contention will not avail him here, for, assuming it to be, as contended, that the executor (as contained in the person of the testator, in respect of all his contracts, and as merely representing the estate of one whose breach of contract had occasioned the injury complained of), would *be liable* to apply the assets of that estate to compensate the injury arising from such breach of contract, although the executor of the person injured could not sue the person who committed the injury, without shewing the personal estate represented by such plaintiff executor to be diminished by the injury complained of, still, the plaintiff here, having had it in his power to exercise an option of suing in form *ex contractu*, or in form *ex delicto*, has elected the latter, and has declared for a malfeasance and misfeasance arising *ex delicto*, to which action, if the executors could be made defendants, they would have to plead that their testator was not guilty; so that the case comes precisely within the second class of cases mentioned by Lord Mansfield in *Hambly v. Trott* (1 Cowp. 375), and which, by *reason of their form*, perish with the offender, and do not survive against his executor.

It was urged upon us that the application was too late, the suggestion having been entered as far back as December last; but the entry, being wholly unauthorized by any law, is, as it seems to me, a mere nullity, and not governed by a rule only applicable to irregularities.

GALT, J., concurred.

Rule absolute to strike out suggestion.

THE QUEEN V. GOODMAN.

Criminal law—Attempt at arson—Evidence.

On an indictment for attempt to commit arson, the evidence shewed that one W., under the direction of the prisoner, after so arranging a blanket, saturated with oil, that, if the flame were communicated to it, the building would have caught fire, lighted a match, held it till it was burning well, and then put it down to within an inch or two of the blanket, when the match went out, the flame not having touched the blanket:

Held, that the prisoner was properly convicted, under 32 & 33 Vic. ch. 22, sec. 12, of an attempt to commit arson.

THE prisoner was tried at the last Spring Assizes, at Hamilton, before S. Richards, Q. C., under an indictment containing two counts; the first, charging that one Francis Waters, unlawfully and maliciously, did attempt feloniously, unlawfully, and maliciously, to set fire to a certain dwelling house, by then and there saturating a blanket with coal oil, and placing it against said dwelling house, and sprinkling coal oil upon the doors and sides thereof, and attempting to apply a burning match to said oil, said house being at the time inhabited.

The second count charged that the prisoner, before the commission of the said felony, did feloniously and maliciously incite, move, procure, aid, counsel, hire, and command said Waters, the felony in manner and form aforesaid, to do and commit, against, &c.

The evidence shewed that Waters, after arranging, under prisoner's directions, the saturated blanket, lighted a match and held it in his fingers till it was burning well, and then put it down towards the blanket, and got it within an inch or two of the blanket when the match went out, the blaze not touching the blanket, and he throwing away the match, and leaving without making any second attempt.

At the conclusion of this evidence prisoner's counsel objected that the evidence of a felony having been committed by Waters was insufficient; that sec. 12, of ch. 22, of 32 & 33 Vic., required an overt act to complete the

offence under that section; that the overt act must be of such a nature as to be capable of setting fire to the building, and that at most Waters's act was only an attempt to commit an overt act.

The learned Queen's Counsel overruled the objection, but reserved the question for the consideration of this Court, and he charged the jury that if they believed Waters poured the oil against the building, and also placed the pieces of blanket saturated with oil on the sills of the doors, and that while at the front door he lighted the match, and while so lighted stooped down to apply it to the oil, intending then to set fire to the oil in the saturated blanket, and thereby to set fire to the house, and was in the act of placing the burning match against the oil, and had reached within an inch or two of it, when the light went out, as he had stated in his evidence—then that these acts constituted a sufficient attempt and overt act within sec. 12, of ch. 22, although the match, while in a flame or burning, never touched the oil or blanket, and although no fire was actually communicated to the oil or blanket.

The Attorney General, for the Crown, contended that the charge was fully sustained by the evidence, and the case brought within the 12th sec. of ch. 22, 32 & 33 Vic. He referred to *Regina v. Taylor*, 1 F. & F. 511; *Regina v. Esmonde*, 26 U. C. 152; *Regina v. Bain*, 9 Cox, 98.

Robertson, contra, contended that it was not such an overt act, within the meaning of the Statute, as would render the prisoner liable to be convicted.

HAGARTY, C.J., delivered the judgment of the Court.

The fact of Waters going away, or ceasing further action after the match went out (not by any act or will of his), seems to put the matter just as if he had been interrupted, or was seized by a peace officer at the moment.

It seems to me the attempt was complete, as an attempt, at that moment, and no change of mind or intention, on prisoner's part, can alter its character.

I see no objection to the charge. There was no doubt the combustible matter was so arranged that if the flame were communicated to it, the building would have caught fire, and the full crime of arson been complete. It would be a reproach to the law if such acts as were here proved do not constitute an overt act towards the commission of arson.

In *Regina v. Cheeseman* (L. & C. 145), Blackburn, J., says: "There is no doubt a difference between the preparation antecedent to an offence, and the actual attempt. But if the actual transaction has commenced which would have ended in the crime, if not interrupted, there is clearly an attempt to commit the crime. Then, applying that principle to this case, it is clear that the transaction which would have ended in the crime of larceny had commenced here."

Regina v. McPherson (D. & B. 202). Cockburn, C. J.: "The word, attempt, clearly conveys with it the idea that if the attempt had succeeded, the offence charged would have been committed. * * Attempting to commit a felony is clearly distinguishable from intending to commit it.

Regina v. Taylor (1 F. & F. 512). The prisoner was indicted for that he by a certain overt act, s. c. by then and there lighting a certain match, &c., near to a certain stack of corn, &c., unlawfully, maliciously, and feloniously, did attempt to set fire to said stack, &c. Prisoner called at prosecutor's house and applied for work; on refusal he asked for money, and on being again refused threatened to burn up the prosecutor. He was watched and seen to go to the stack, kneel down close to it, and strike a match; but seeing he was watched, he blew it out and went away. The stack was not at all burned. Pollock, C. B., told the jury that "If they thought the prisoner intended to set fire to the stack, and that he would have done so had he not been interrupted, in his opinion this was in law a sufficient attempt to set fire to the stack." After stating that buying a box of matches, with intent to set fire to a house, would not be sufficient, he adds: "The act must be one imme-

diately and directly tending to the execution of the principal crime, and committed under such circumstances that he has the power of carrying his intention into execution." The jury found that they were not satisfied that prisoner intended to set fire to the stack, but they thought he intended to extort money from prosecutor by his conduct. This was held to amount to not guilty.

I think the law laid down in this case fully supports the present conviction, and that our judgment should be for the Crown.

Judgment for the Crown.

DRAKE ET AL. V. WIGLE.

Tenant for life—Waste—Pleading.

In an action by reversioner, against tenant, for injury to the reversion, caused by cutting down and carrying away trees and underwood, defendant pleaded his tenancy, under a demise from D., for 19 years; that at time of demise the land was chiefly wild and in a state of nature, and could not be used for farming purposes, for which it was demised, and defendant cut down and removed the trees, &c., upon a portion of the wild land, cleared, and made it fit for cultivation, fenced and cultivated it, making it productive and useful, and thereby improved the land in value and did not injure plaintiff's reversion.

There was a further plea alleging that D. was tenant for life by the curtesy, and defendant was seised of the reversion of the land, in fee simple, as tenant in common with plaintiffs and others; that D. demised to defendant, and the land being wild, &c. (as in the other plea); and defendant, being tenant under said demise, and seised of the reversion, as tenant in common, cut down, &c., and thereby cleared the land in the manner customary in the neighborhood, and generally in Ontario; and defendant improved the value of the land, and did not injure the reversion:

Held, on demurrer, both pleas bad; but the Court declined, under these pleas, to decide the question whether the law of England, as to waste by tenant for life, was applicable, in its integrity, to lands in this Province.

DECLARATION, that plaintiffs were seised of certain lands (described), which were held by certain parties as tenants, and the reversion of which was the reversion of plaintiffs; that defendant wrongfully injured plaintiffs' reversion by cutting down and carrying away the trees and underwood.

Pleas (4), that defendant was tenant of the said lands, under a demise from one William Drake, for a term of 19 years; that when the land was so demised, it was for the most part wild and in a state of nature, and could not be used for farming purposes, for which it was demised, and defendant cut down and removed the trees, &c., upon a portion of the wild land, cleared and made it fit for cultivation, fenced and cultivated it, making it productive and useful, and thereby improved the land in value, and did not injure the plaintiffs' reversion, as alleged.

The 5th plea was, that one Drake was tenant for life, by the curtesy of England, of the land, *and defendant was seised of the reversion of the land in fee simple, as tenant in common with the plaintiffs and others*; that Drake demised the land to defendant for 19 years, and the land, being wild and in a state of nature, was unfit for cultivation and comparatively useless until cleared of timber, &c.; and defendant, being the tenant under said demise, *and seised of the reversion as tenant in common*, cut down and removed the trees and underwood, &c., and thereby cleared the land in the manner customary in that neighborhood, and generally in Ontario; and defendant reduced the land to a state fit for cultivation, fenced it, made it productive, and enhanced the value thereof; and the grievances complained of were necessarily and properly done in the clearing and improving the land, and did not injure the reversion.

Demurrer (to both pleas).

On the argument the broad question was raised, whether the law of England as to waste was to be applied, in its integrity, to lands in this Province, or whether the peculiar circumstances attending the reclaiming and cultivation of wild lands here, did not call for the adoption of a different rule, *Prince, Q.C.*, for the demurrers, maintaining the former contention, and referring to the last edition of *Addison* on Torts, 225, *Harrison, Q.C.*, contra, contending that even in England every case depended on its own particular circumstances; that in this country the cutting of timber

for purposes of cultivation or husbandry could not be considered waste, citing *Chisholm v. Sheldon*, 1 Grant, 319. He also referred to several American cases, viz.: *Hastings v. McCutcheon*, 3 Yeates (Penn.), 261; *Jackson v. Brownson*, 7 Johnson (N. Y.), 227; *Keeler v. Eastman*, 11 Ver. 293; *Kent's Com.* 4th vol. 76. The law of England, he argued, only applied in so far as it suited the circumstances of the country: *Tayler v. Tayler*, 5 O. S. 501.

HAGARTY, C. J., delivered the judgment of the Court.

It seems impossible that a question of such magnitude can be raised by a plea framed as this fourth plea is. The interest of the defendant is not shewn, whether he holds under a tenant for life, or years, or any other estate. The plea avers that he holds for 19 years, under one Drake. Nothing is said as to the nature of the interest of Drake. It would be manifestly improper for us, on such averments, to enter upon the wide discussion suggested.

The fifth plea leaves it in doubt whether the defendant intends to justify, as lessee for years under the tenant, by the curtesy, or as tenant of the reversion in common with the plaintiffs.

It was argued as if the justification was in right of the tenant by the curtesy; but the assertion of the position of reversioner prevents our deciding the case on the foundation on which it was argued; but upon whichever ground the defendant rests, the plea, in common with the 4th plea, seems to us to fall short of a defence.

One tenant in common is liable to an action on the case, at the suit of the others, for misfeazances, viz., for acts injurious to the inheritance: See *Martin v. Knollys* (8 T. R. 145) and cases there cited.

Primâ facie, the cutting down all the timber on a lot, even for the purpose of converting it to tillage or grazing, is waste, and an injury to the inheritance.

To raise the question whether, in this country, a different rule from that of England must prevail, must, we think, depend on the circumstances of each case, whether the

acts done were or were not waste; such as, the extent of the lot or estate, the quantity cleared of timber, the nature of the timber cut, whether such timber is usually cut for clearing purposes, or was valuable merely as timber, whether a reasonable quantity for ordinary farm purposes were reserved, &c., &c.

As between reversioner and tenant for life an important question might also arise as to the application of the proceeds of timber sold off the land, whether for clearing purposes or not.

Consistently with both pleas, the defendant may have completely stripped the land of all timber, leaving nothing for fencing or farm purposes.

We have looked into the authorities, English and American, on the main question, together with the remarks made from time to time by our own Law and Equity Judges, and are prepared to express our opinion whenever the question is fairly presented to us.

We hold both the pleas to be defective on grounds apart from the main question: See *Leith* on Real Property, 226, and cases there collected; 4 *Kent's Com.* 76; *Seagram v. Knight* (L. R. 3 Eq. 398, 2 Chy. Appeals, 628); *Lord Cowley v. Lord Wellesley* (1 Eq. 656).

VENTRIS V. BROWN ET AL.

Action for excessive levy—Omission of words “maliciously and without probable cause”—Pleading.

Declaration (2nd count), that defendants having recovered said judgment and execution against plaintiff and others, as in 1st count mentioned, plaintiff and said others made payments from time to time and otherwise satisfied portions thereof, until on or about, &c., plaintiff and said others, by such payments and satisfaction, had paid and satisfied said judgment debt, &c., over and above the amount so credited on said execution, as in 1st count mentioned, save and except a small amount, not exceeding about \$20; yet defendants, well knowing, &c., and notwithstanding the small amount due, but contriving and intending to injure and aggrieve plaintiff, thereafter, to wit, &c., *wrongfully and unjustly*, and by the pretence that there was a large amount due, to wit, &c., caused the sheriff to take and seize certain goods of great value, to wit, &c., of plaintiff's, and to make thereout \$200, &c., &c.
Held, on demurrer, bad, for not alleging that the act complained of was done maliciously, and without probable cause.

Declaration (2nd count),—also, for that defendants having recovered said judgment and execution against plaintiff, and said Benjamin and Thomas Ventris, in manner and under circumstances in first count mentioned, plaintiff and said Benjamin and Thomas Ventris thereupon, from time to time, made payments upon said judgment debt, and otherwise satisfied portions thereof from time to time, until on or about 20th June, 1871, said plaintiff and said Benjamin and Thomas Ventris, by such payments and satisfaction, had paid and satisfied said judgment debt, and all interest and costs thereupon payable, over and above the amount so credited on said execution, as and under the circumstances in first count mentioned, save and except a small amount thereof, to wit, not exceeding the amount of \$20, or thereabouts; yet defendants, well knowing the premises, and notwithstanding the fact that a small portion only remained due in respect of said judgment, to wit, said sum not exceeding the sum of \$20, or thereabouts, but contriving and intending to injure and aggrieve plaintiff, thereafter, to wit, on or about the 21st June, 1871, *wrongfully and unjustly*, and by the pretence that there was a large amount remaining due under such

judgment, to wit, the sum of \$200, or thereabouts, over and above the amount so credited on said execution, as under the circumstances in first count mentioned, and over and above said payments on account, caused and procured the Sheriff of the County of Peterborough, who still held said execution, to take and seize certain goods and chattels of great value, to wit, of the value of \$500, of plaintiff, within the bailiwick of the said sheriff, under color of said execution, and to make thereout said large sum of money, being the sum of \$200, over and above the amount so credited as aforesaid on said execution, and over and above such payments, although only said small amount was due thereunder; and caused and procured said sheriff, under color thereof, to take and retain said goods and chattels for a long space of time, and to deprive plaintiff of the use and possession thereof, and to advertise and expose for sale said goods and chattels, and to sell same, or a sufficient portion thereof, to yield and pay the sum of \$200, or thereabouts, whereby plaintiff was prevented, for a long time, in carrying on his business as a manufacturer of lumber, and was for a long time deprived of the use and possession of his said chattels, and whereby also said plaintiff was greatly injured in his credit and mercantile reputation, and whereby other parties, who had theretofore made advances to the plaintiff, to enable him to carry on his said business, and would otherwise have continued to make such advances, refused and declined to make further advances, but on the contrary thereof pressed plaintiff for the amount of such previous advances, and impleaded plaintiff upon the same, and recovered judgment against the plaintiff upon the same, and thereby put plaintiff to great and unnecessary cost and expense, and plaintiff was thereby prevented from carrying on his said business to the same extent that he would otherwise have been able to do, and would have done; and plaintiff was otherwise put to great trouble and expense, and loss of time, in and about the premises.

Demurrer: That said count admitted a regular judg-

ment and execution for the amount for which the seizure was made, and it was not shewn that such judgment or execution was, as to such amount, satisfied, reversed, or set aside.

2. That no valid agreement was shewn binding defendants to treat any part of the judgment as not properly enforceable; and that a parol agreement (even if otherwise well pleaded) could not, at law, control a judgment.

3. That plaintiff had no remedy by action, in this Court, for the alleged grievance.

C. S. Paterson, Q. C., for the demurrer, contended that malice, and want of reasonable and probable cause, should have been alleged, referring to *Churchill v. Siggers*, 3 E. & B. 929; *Gilding v. Eyre*, 10 C. B. 592; *Huffer v. Allen*, L. R. 2 Ex. 15.

H. Cameron, contra, cited *Douglas v. Mayer*, 5 C. P. 377; *Tay. Ev.* II. 243.

GWYNNE, J., delivered the judgment of the Court.

After the decision in *DeMedina v. Grove*, in the Exchequer Chamber (10 Q. B. 172), and that in *Churchill v. Siggers* (3 El. & B. 937), we must hold it to be concluded that the count here demurred to is insufficient, without the allegation that the Act complained of was done maliciously and without probable cause.

In *Gough v. Cribb* (11 M. & W. 497), it is true, there was a count framed similarly to the one here demurred to; but there no objection was taken to the count, and the plaintiff failed for want of proof on the issues joined. But in *DeMedina v. Grove*, which contained a count similar to that objected to in this case, and to that in *Gough v. Cribb*, the defendant, after verdict against him upon issues joined on his pleas to the count, succeeded on a motion in arrest of judgment. That decision must be taken to conclude the point.

Judgment for defendant on demurrer.

CRAIG V. MILLER.

Sale of goods at auction—Catalogues distributed before sale—Terms announced at sale—No warranty.

In a printed catalogue of articles for sale, a bull was stated to be "a sure stock-getter," but at the commencement of the sale the auctioneer publicly announced that the seller (defendant) warranted nothing:

Held, that plaintiff (the purchaser) in an action as for a breach of warranty, was obliged to shew that a warranty, if any, contained in the catalogue, was imported into the sale at auction at which he bought.

THE plaintiff, in two counts, declared as for a breach of warranty of a bull, as a sure stock-getter, and, in three counts, for inducing the plaintiff to buy the bull by fraudulent representations that it was a sure stock-getter, when in fact the defendant well knew that it was not, and for fraudulently concealing the fact, of which the defendant was well aware, that the bull was impotent, and unfit for purposes of breeding.

At the trial, before the Chief Justice of this Court, the plaintiff abandoned the counts as for fraudulent representation and concealment, and the question turned wholly upon the counts for breach of warranty.

The plaintiff proved no written contract whatever. He based his right to recover upon the fact that the defendant circulated a catalogue of cattle *to be sold* by public auction, on Wednesday, January 18th, 1871. At the foot of the pedigree of the bull in question, in the catalogue, was the following note: "N. B. Duke of Riggfoot took first premium in his class, and sweepstakes for the best bull on the ground, at the Northern Ohio Fair Association of 1870, and also at the Lake County Fair, held in Painesville, competing against a great many of the best bulls in the United States; is a sure stock-getter, and has been used for two years, with good success, in the herd of Mr. James Waitson, Atha P. O., Ontario."

The plaintiff himself was called on his own behalf, and swore that on the morning of the sale he got one of those catalogues at the defendant's house; that he was at the

sale at its commencement by the auctioneer, and that he heard nothing announced by him to the effect that nothing would be warranted.

At the close of the plaintiff's case, *M. C. Cameron*, Q.C., for the defendant, moved for a nonsuit upon the ground that plaintiff had not proved any warranty. Leave was reserved to him to move upon this point, and, subject to such leave, the case proceeded.

It was proved by the auctioneer and his clerk, and another person who bought at the sale, that before entering upon the sale, when announcing the terms of sale, the auctioneer, in a public manner, notified the audience that he had the orders of the defendant to declare that the seller would warrant nothing, and that buyers must buy at their own risk, and that the defendant, who was also present at the same time, said that he warranted nothing.

The learned Chief Justice told the jury that if there was a warranty at all, it only applied when the warranty was made, not that the bull would thereafter be a sure stock-getter; and he said further, that if the terms of sale were fairly and openly announced at an auction, and the audience distinctly informed that the vendor positively refused to warrant any thing, it was not necessary to repeat this as every lot was put up, and persons coming in after commencement must be bound by it.

The jury rendered a verdict in favor of the defendant.

Harrison, Q.C., obtained a rule *nisi* to set aside the verdict as against law and evidence, and the weight of evidence; and for misdirection in not telling the jury that the plaintiff was entitled to rely upon the warranty which, as he contended, was contained in the catalogue, and that he was not bound by any thing said by the auctioneer, the plaintiff not having heard the announcement.

M. C. Cameron, Q.C., shewed cause, contending that the catalogue contained no warranty, as it was not signed, and that even if it did, the auctioneer's announcement, at the commencement of the sale, was a withdrawal of it. He

referred to *Gunnis v. Erhart*, 1 H. Bl. 289; *Powell v. Edmunds*, 12 Ea. 6; *Eden v. Blake*, 13 M. & W. 614.

Harrison, Q. C., contra, drew attention to the wording of the catalogue, and contended that it amounted to a warranty, and that in the absence of proof that the announcement of the auctioneer had come to the ears of the plaintiff, he had a right to consider the memorandum contained in the catalogue as a warranty, and, if the bull did not answer the description therein given, to sue for a breach thereof. He cited *Power v. Barham*, 4 A. & E. 473; *Powell v. Horton*, 3 Sc. 110; *Allan v. Lake*, 18 Q. B., 560; *Nichol v. Godts*, 10 Ex. 191; *Simond v. Braddon*, 2 C. B. N. S. 324; *Josling v. Kingsford*, 13 C. B. N. S. 447; *Chisholm v. Proudfoot*, 15 U. C. 203; *Percival v. Oldacre*, 18 C. B. N. S. 398; *Horsfall v. Fauntleroy*, 10 B. & C. 755.

GWYNNE, J., delivered the judgment of the Court.

The jury have by their verdict found, in effect, that it was openly and fairly announced by the auctioneer, at the opening of the sale, that nothing sold would be warranted, and that buyers should buy at their risk, and we see no just ground of objection to the charge of the learned Chief Justice.

To entitle the plaintiff to recover, it was necessary for him to establish that the contract under which he purchased contained a warranty to the effect declared upon. Now, in this case, there is no written contract relied upon, although, in the natural course of sales at auction, there is generally such a contract signed by the auctioneer, as agent for the purchaser as well as the seller. In this respect this case is distinguishable from *Power v. Barham* (4 Ad. & El. 473) and cases of that description, which did proceed upon a written contract. Now the question here is, wherein, in the absence of a written contract, is the contract of sale to be found? The actual sale took place at the auction, the terms of which, according to the evidence and the finding of the jury, were fairly and openly announced at

the opening of the sale, that there would be no warranty. This was at the same time repeated by the vendor. Assuming that the plaintiff did not hear this announcement, it was no less publicly made by the auctioneer and his principal, the vendor. This was a plain declaration by the seller of the terms upon which he intended to contract, notwithstanding any thing which there might be in the catalogues distributed announcing the intended sale.

It appears to me, under these circumstances, that the contract must be taken to have commenced when the terms of the sale were announced to the general public by the auctioneer, at the commencement of the auction, and ended, in so far as this particular beast is concerned, when it was knocked down to the plaintiff. If the seller or the auctioneer was suing plaintiff upon his contract of purchase, as in *Eden v. Blake* (13 M. & W. 614), it might be, perhaps, that the plaintiff could object that the catalogue had deceived him, and that he had not heard the terms announced, to the effect that there would be no warranty, &c., &c. But here the case is reversed, for upon the plaintiff lies the onus of proving that what is contained in the note, extracted from the catalogue, not only is a warranty of the nature insisted upon, but that it was contained in the contract upon which he purchased; and it was not if (as *Eden v. Blake* establishes) the vendor, before the sale to the plaintiff, made a deviation from the terms stated in the catalogue; and this we think he did do effectually, when, as found by the jury, the auctioneer made the announcement, at the opening of the sale, which was proved in evidence here. Upon the authority of *Hopkins v. Tanqueray* (15 C. B. 130), I think that the application to nonsuit the plaintiff, if the verdict had been in his favor, should have prevailed, for in the presence of clear evidence as to the terms of sale, as announced to the general public, we could not, upon an allegation that the plaintiff had not heard the announcement, from any thing which appears here, import into the contract of sale *with him*, a term which a bidder, who had heard the terms of sale, could not

have claimed to be part of *his* contract, if *he* had been the purchaser instead of the plaintiff. If the plaintiff intended to insist, when the beast was knocked down to his bid, that the representation now relied on amounted to a warranty, and that he purchased upon the faith of it, it lay upon him to shew that the representation so relied on, was *in fact* imported into the *actual sale* which took place at the auction: this he has failed to do, and I see no ground whatever for disturbing the verdict. The fallacy of the plaintiff's argument, as it appears to me, consists in attributing to the catalogue the character of the contract of sale, which the plaintiff, upon whom the onus lies of establishing the contract, does not shew it to have been; whereas, on the contrary, I think the evidence sufficiently shews that it was not. The rule therefore must be discharged.

Rule discharged.

GREENWOOD V. FOLEY.

Promissory note payable in foreign country and currency—Action in this Province—Satisfaction and discharge—Evidence.

A note payable in the United States, in American currency, and all the parties to which reside in this country, may be sued upon here.

The note in this case was payable by defendant to plaintiff, and sent to him on application for payment of an account, and after acknowledgment of its receipt, stated to have been "placed to your credit: the endorsers are not known to us, but on your stating that each one is good for the amount, we accept the note in settlement of your account to date." At the maturity of the note defendant wrote expressing regret at his inability to meet it and requesting him to draw upon him, and that he could hold the note until payment of the draft: he subsequently telegraphed him that he would remit in a few days.

Held, a question, on the evidence, for a Judge or jury, whether plaintiff had accepted the note in satisfaction or discharge, or not, and it having been found that he had not, the Court refused to interfere.

DECLARATION (1st Count) against defendant, as maker of a note payable to H. Wood or order, in New York, for \$581.40, American currency, at three months, endorsed by Wood to one Bradshaw, who endorsed to plaintiff, &c.

2nd count. Goods sold, common money counts, and account stated.

There was then a *nolle pros.* as to the 1st count.

Pleas: 1. Never indebted. 2. That, at plaintiff's request, defendant made a note (set out *verbatim*), and procured it to be endorsed and delivered to plaintiff, who accepted it in satisfaction and discharge of plaintiff's claim.

Issue.

The note set out in the plea seemed to be that declared on in the 1st count. It was dishonored before action brought.

The case was tried by Wilson, J., without a jury, at Lindsay.

The facts appeared to be that plaintiff, a manufacturer in Rochester, U. S., sold goods to defendant, who lived at Lindsay. After several applications to him for payment, he sent his own note, payable in New York. This was in May, 1871.

Plaintiff sent this note back, saying there should be a responsible endorser, and without that he could not accept it in settlement. On 16th May, 1871, defendant wrote, enclosing the note mentioned in the plea, with two endorsers, who (he said) were good for the amount, and that the note would be promptly paid. On 19th May, 1871, plaintiff wrote acknowledging that the note was received, "and placed to your credit, with thanks. The endorsers are not known to us, but on your stating that each one is good for the amount, we accept the note in settlement of your account to date."

The note was protested 19th August, 1871. On 16th August defendant wrote to plaintiff that he could not meet the note, but asking him to draw at forty days for the amount in gold, and he would meet it, adding, "You can hold the note, with the endorsers, until the draft is paid"; and expressing regret at the annoyance given to plaintiff.

In September he telegraphed to plaintiff that he would remit to him in a few days.

The note was not discounted by plaintiff, but only sent to New York for collection.

The plaintiff produced the note at the trial.

The objection was taken, for the defendant, that the plaintiff could not recover on the original account, as the note was taken in satisfaction.

The learned Judge found a verdict for plaintiff.

In Easter Term, *H. Cameron* obtained a rule to enter a verdict for defendant, on the same ground, and that defendant was entitled to a verdict on the plea setting up the acceptance of the note in satisfaction.

C. S. Paterson shewed cause, pointing out that the note could not be sued on in Canada, where all the parties lived, being payable in American currency. He further contended that the whole question was one of evidence. Was the note in question taken in satisfaction of the account? The finding of the learned Judge was, that it was not so taken; and the only evidence relied on by defendant was the letter of plaintiff acknowledging the receipt of the note *in settlement* of the account, which did not necessarily mean in satisfaction.

The cases on the subject were all on questions of pleading, from *Kearslake v. Morgan*, 5 T. R. 513, to the late case of *The National Savings Bank v. Tranah*, L. R. 2 C. P. 556.

H. Cameron, contra, contended that plaintiff could not sue on the original account, as the note was taken in satisfaction, citing *Sibree v. Tripp*, 15 M. & W. 23; *Sayer v. Wagstaff*, 5 Beav. 415; *Addison*, Contracts, 991 to 993.

HAGARTY, C. J., delivered the judgment of the Court.

As to the point that the note could not be sued on here, we do not see how a note may not be made and endorsed in Canada, payable in New York, for a stated sum in dollars, American currency, the money of the place of payment. The cases cited do not support such a proposition.

The defence rests on a purely technical point. It is unfortunate that a *nolle pros.* was entered to the count on

the note. If a good note, the defendant, the maker, was liable thereon; if a bad note, the original consideration could be resorted to. We must not give effect to the defence, unless absolutely forced so to do by the clearest law.

The whole case rests on plaintiff's letter on the receipt of the bill. When he says the note is "received and placed to your credit," that would merely import that it was taken on account, and credit given during its currency. Plaintiff then proceeds, "The endorsers are unknown to us, but, on your stating that each one is good for the amount, we accept the note in settlement of your account to date." This is the whole evidence. A plea using such words as these would not be sufficient as an accord and satisfaction: (See remarks of Wightman, J., cited in *Bottomly v. Nuttall* (5 C. B. N. S. 134, and the cases there noticed).

The plaintiff, when examined, was not asked any thing to explain his letter.

At the maturity of the note defendant wrote expressing great regret at all the delays, and asking plaintiff to draw on him at forty days, and that he could hold the note till defendant was paid.

It seems to me that it was a fair question for a Judge or jury, whether plaintiff had accepted the note in satisfaction or discharge, or not. When he says, "we accept the note in settlement of your account to date," he may have only meant the usual closing of the account by note, in the mercantile sense, and as an extended credit during its currency, and not as an unconditional abandonment of the original claim; or, in Baron Parke's words, "an agreement to take the note for better or worse." The learned Judge has found his verdict for plaintiff. It is quite true that we may find whatever verdict he should have found, but I think we are in no way bound in such a case to hold him necessarily wrong, and turn this into a verdict for defendant. The simple effect would be the incurring of much cost, and a certain recovery against the defendant some months hence.

If the case were perfectly clear, this result would not justify our refusal to give effect to the objection. As we think it a matter of evidence, one way or the other, we decline to interfere.

Rule discharged.

EX REL. McMULLEN V. CORPORATION OF CARADOC.

Municipal corporation—Boundary of road allowance.

Held, that a municipal corporation has no power to declare certain posts planted by a surveyor to be the true boundaries of an original road allowance which they direct to be opened. They may give a description of the boundaries, but ought not to declare such boundaries to be the true boundaries, such being then a matter in dispute.

IN Hilary Term last, *F. Osler* obtained a rule to shew cause why By-law No. 176, intituled, "A By-law to open the side line between 8 and 9, in 2nd concession north of the Longwood Road, in the Township of Caradoc," should not be quashed, with costs, on the following grounds: 1. That the council had no power to pass such a by-law; 2. That the by-law was void on its face; 3. That if they had the power, it was not a proper exercise of their discretion, and that they should have left parties interested in the boundaries of the side line to ascertain the same by action.

Affidavits were filed on both sides.

The by-law was passed 18th November, 1872. It recited that it was desirable that the side road between lots 8 and 9 in the 2nd and 3rd concessions should be opened up, and that, according to a survey made by one Springer, a Provincial Land Surveyor, said road was bounded as follows, &c., &c. It then enacted that said road, as described in the by-law, should be and was thereby declared to be the side road between said lots 8 and 9, in the 2nd and 3rd concessions, &c., and that said road should be opened on 18th November then next.

A contest had existed for several years between the proprietors of lots 8 and 9 as to the true position of the

allowance for road between the lots. For some years there had been a line travelled as the road, and public money and statute labour expended thereon.

In 1867 the council had the ground surveyed by Mr. Springer, and in his view the true road allowance was some rods further west than the travelled road, and one Bateman, acting as pathmaster, and others, entered on McMullen's lot, No. 8, and commenced cutting trees, &c., on the supposed new line of road.

McMullen brought an action against him, which was tried in the fall of 1869, as a question of survey, and a verdict was recovered by McMullen, which was upheld by this Court on motion. This was against Springer's evidence. It was alleged that Bateman was interested, and that by his interest and influence, the council had espoused his side of the quarrel, and after passing a by-law in March, 1869, which was quashed by this Court, no cause being shewn against it, the present by-law was passed.

The affidavits were voluminous, and bore almost wholly on the question of survey, each side producing a good deal of testimony.

In Easter Term, *J. H. Cameron*, Q.C., shewed cause. No injury is done to any one by this by-law. If the council proceed to open the side line, as defined by the by-law, they will do it at their peril, and the question may be tested in an action against them: sec. 205, Municipal Act.

The weight of evidence, on the affidavits filed, is in favor of the line as opened by the council; therefore the Court should not interfere in this summary manner, but leave the applicant to his legal remedy. On the former application no cause was shewn to the rule to quash, and it became absolute on default merely, and the council were no parties to the action of trespass.

F. Osler, contra. The council, in passing this by-law, are interfering in a dispute between private parties. A side road, which was opened by by-law, has existed between

the lots in question since 1851, and there is no public necessity for opening a new road. This is not a proper exercise of the discretion of the council. If the applicant is really enclosing a part of the side road, he can be indicted, and the question ascertained in that way. The Court has already quashed a similar by-law, and the question has been fairly tried between the parties really interested, and it is apparent that the real object of the council in passing this by-law is not so much to open the road as to assist one man at the expense of another. Conceding that the council has power to open any side road, they can only declare that the original allowance for road shall be opened; they have clearly exceeded their power in enacting that a road, as defined by metes and bounds by any particular surveyor, shall be the side road. From the peculiar language of sec. 205, the applicant may be embarrassed in any suit he may bring against the council for any thing done under the by-law, unless it is quashed. He referred to *Burritt v. Corporation of Marlborough*, 29 U. C. R. 119.

HAGARTY, C. J.—It is impossible to try the question on a motion of this character.

The question before us is not whether the by-law was a wise or proper exercise of corporate powers, but whether it is legal. If the by-law confined itself merely to declaring that the road should be opened, giving Springer's metes and bounds, by way of description, I think we could not interfere. The defendants have a clear right to open an original allowance, and in so doing they must, at their peril, be correct as to its true position.

We cannot, I think, accede to either of the two first objections. It is not altogether void on its face. It affects to give a description by certain fixed boundaries in accordance with posts put down by Springer. These may be right or they may be wrong. When the defendants attempt to enforce it, that question may be determined.

Mr. Osler's argument was in effect that, as a *bonâ fide*

contest was existing as to the true boundary, the corporation could not adopt one side or the other. The answer seems to be, that the by-law merely carries out a clear statutable power. It authorizes the opening of the original allowance; but it in no way makes the boundaries to be as Mr. Springer places them, unless the latter gentleman be correct, which is a matter to be proved, if questioned.

It seems to me that the very reason which prevents this Court holding this by-law to be illegal, is that which should have prevented the defendants from exercising their statutable power, viz., the uncertainty as to the true boundary. If it were shewn to us clearly that the proposed boundaries would force the road through a man's property, unquestionably protected by statute law or exemption, that might be a ground for interference. Here the by-law is right (however indiscreetly adopted), if Springer's survey be right.

Unless, therefore, we are prepared to try a boundary case, with much conflicting testimony on affidavits, we must not wholly set aside this by-law.

The by-law is to open the original allowance, and cannot, as we think, authorize a trespass on any land shewn not to be part of such allowance.

The case of *Ex rel. Burritt v. Corporation of Marlborough* (29 U. C. 119), differs widely from the present. There the by-law was to open an original allowance, as to the true position of which there seemed to be no dispute. For sixty years a conventional road had been used in lieu thereof, and there was strong evidence to shew that the proprietors had given this latter road, without compensation, instead of the original allowance. Richards, C. J., says: "The question is, whether these proprietors, if they, or those under whom they claim, opened the road without receiving compensation therefor, and being in possession of the concession road, are not entitled thereto in lieu of the road laid out; and, if they are, can they be deprived of the same by a by-law directing it to be opened as an original allowance. * * * In my view, I do not think

we should permit a by-law to stand which assumes to dispose of the rights of these parties as if they had no claim whatever to this road allowance, and for that reason, if for no other, we should quash the by-law if we are satisfied that the facts bring the party seeking to quash it within the provisions of the statute."

But I agree in holding that we should not allow any part of the by-law to stand which declares that the particular boundaries there given shall constitute the true original allowance. We do not question the right to open the allowance, nor do we interfere with any description they may choose to give. But we think we must not embarrass any property owner in the fair trial of his rights, by leaving the by-law with a *quasi*-legislative declaration as to its operation.

The present state of the statute law as to the possible effect of a by-law not quashed by the Court, is a strong reason for removing this clause. My brother Gwynne has pointed out the words which we think must be expunged.

I think there should be no costs on either side. The relator only partially succeeds, and three-fourths of the voluminous evidence produced bears wholly on the survey question, with which we do not think we can interfere. We give no costs.

GWYNNE, J.—The by-law appears to partake of the vice of the former one, in so far as it purports to declare and enact that the side road, as set out by metes and bounds, and described in the by-law, shall be and is thereby declared to be the side road between the said lots 8 and 9 in the 2nd and 3rd concessions of the Longwood Road, in the township of Caradoc. If the limits assigned be not the true limits of the side road, as originally surveyed, the council has no jurisdiction to enact and declare that they shall be; and whether the declaratory enactment have any validity or not, a person *bonâ fide* contesting the true site of the road, has, I think, reason to complain of such a clause being inserted in the by-law, as calculated to expose

him to difficulties at any rate, if not to prejudice him in the conduct of any litigation which he may institute for the purpose of bringing the point in difference up for judicial enquiry; but, in enacting that the original road allowance shall be opened, although describing that road by metes and bounds, I do not see that the applicant can be prejudiced, for in any litigation arising upon the point, it would, I apprehend, in such a case, be necessary to establish that the metes and bounds assumed to be are in fact the true limits of the original allowance. The first clause of the by-law will have, therefore, to be quashed, which will be effected by expunging all between the words "township of Caradoc," in the first enacting clause, and the words "that the said side road," in the second.

Judgment accordingly.

SNYDER V. SNYDER.

Sale of land subject to mortgage—"Demise" by vendee to vendor—Assignment by vendor to third party—Payment of mortgage by assignee—Action against vendee for money paid to his use—Amendment of declaration refused.

P. conveyed certain land to defendant, "subject to a mortgage," and with covenant for quiet enjoyment, free from all incumbrances. Defendant then demised the same land to P. and wife for the term of their respective natural lives, and P. granted and assigned to plaintiff all his right, title, and interest therein, to hold during the life of P. The mortgagees, or their assignee, brought ejectment against both plaintiff and P., when plaintiff paid the amount due under the mortgage, and then brought an action against defendant for money paid to his use: *Held*, that he could not recover in this form of action, but *Seemle*, his remedy would be on the implied covenant for quiet enjoyment, contained in the life lease to P.

The Court refused to allow plaintiff to amend, by adding a count as assignee of the covenant to pay the mortgage contained in the deed from P. to defendant.

DECLARATION for money paid, interest, and account stated.

Plea, never indebted. .

At the trial, before Wilson, J., at Picton, the following facts appeared :

On 22nd March, 1864, Peter Snyder mortgaged certain land, in fee, to the Trust and Loan Company, for \$600, payable April, 1869. On 3rd May, 1867, he conveyed, in fee, to Lewis Snyder, the same parcel, with covenant for right to convey, "subject to a mortgage to the Trust and Loan Company of Upper Canada, for \$600, and interest, and to the payment of \$500 of the same, and interest," and with covenant for quiet possession, free from all incumbrance.

On the same day Lewis Snyder, in consideration of the rent, covenants and agreement therein, demised said land to Peter Snyder and Catharine, his wife, and their assigns, (being the land that day sold by Peter to Lewis), *habendum* to them and their assigns, during the natural lives of them and the survivors of them, at the rent of \$1 per annum, with covenant for payment of the rent.

On 5th June, 1871, Peter Snyder granted and assigned to plaintiff, Everett Snyder, all his right, title, and interest in and to the said land, *habendum* during the life of Peter Snyder, and plaintiff covenanted to support and maintain Peter, and Catharine, his wife, during Peter's life.

The mortgage to the Trust and Loan Company was assigned by them to R. S. Cartwright, on 21st September, 1868, and on 6th July, 1871, Cartwright assigned it to one Miller, who on 21st August, 1871, issued an ejectment summons against Peter and Everitt Snyder (the plaintiff). The particulars of claim attached to the record were \$336, balance of principal and interest due on the mortgage by Peter Snyder to the Trust and Loan Company, paid by the plaintiff to Miller, the holder of the mortgage, at defendant's request, with costs of Miller's action of ejectment.

It was argued for the plaintiff that in the deed from Peter to defendant Lewis, there was an implied covenant by the vendee to pay the mortgage money, and, apart from the covenant, it was vendee's duty to pay the mortgage; and that the words "demise" and "lease," in the life lease to Peter, constituted a covenant for quiet enjoyment.

The learned Judge found a verdict for defendant, with

leave to plaintiff to move to enter a verdict for him for \$347, if the Court thought he could recover, with leave also to him to amend to the same extent as a Judge could at trial.

In Easter Term, *F. Osler* obtained a rule, on the leave reserved, to amend the declaration by adding a count on the covenant, in the deed of 3rd May, 1867, from Peter to Lewis, the defendant, whereby defendant covenanted to pay the mortgage, the plaintiff being the assignee of the covenant, and for a new trial on such amended declaration.

K. McKenzie, Q. C., shewed cause. He contended that the rule should be discharged. There was no express or implied request to pay the money in question. The plaintiff did not pay the money for the defendant but for himself. There was no privity between them. There was no legal debt due, from the defendant to the plaintiff. If any debt was due, it was to Peter Snyder.

To maintain this action the plaintiff would require to shew that the defendant was primarily liable to pay the money to Miller. There was no obligation whatever on the part of the defendant to pay the money to Miller. On that ground alone the action failed. The Chief Justice said that is the proper criterion. Besides, the plaintiff paid to benefit himself and obtain possession.

This was not a compulsory payment by the plaintiff of a debt of the defendant for his benefit. The defendant never paid Miller anything.

He referred to *Crafts v. Tritton*, 8 Taunt. 365; *Burnett v. Lynch*, 5 B. & C. 589; *Moore v. Pyrke*, 11 East 40; *Exall v. Partridge*, 8 T. R. 308; *Griffinhoofe v. Laubuz*, 5 E. & B. 746; *England v. Marsden*, L. R. 1 C. P. 529.

As to the amendment proposed, it cannot be made. The Court would require to change the suit, and substitute one plaintiff for another.

Osler, contra. The money paid by the plaintiff may be recovered in this form of action, for it was paid in order

to prevent him from being ejected by the mortgagee, whose claim the defendant was bound to pay off; and the effect of the payment was to redeem the defendant's property. Where one person pays money which another is, as between himself and the person who pays the money, liable to pay, the amount may be recovered in this action, and the same rule should apply even where a personal liability does not exist, but the estate or property of the defendant has been relieved by the payment. He cited *Grissell v. Robinson*, 3 B. N. C. 10; *Maxwell v. Jameson*, 2 B. & Al. 51; *Dawson v. Linton*, 5 B. & Al. 521; *Clark v. Chipman*, 26 U. C. 170.

HAGARTY, C. J.—I think plaintiff must stand or fall on the declaration, as it now is, for money paid. To introduce a count on a covenant in the deed from Peter to Lewis, is to completely recast the action, and possibly to require the addition of special pleas, or a raising of the question by demurrer. In its present shape plaintiff has to shew that he has paid money to defendant's use.

As there is no pretence of any express request, he must, I presume, be in a position to shew that he was compelled to pay money which defendant ought to have paid, and that his payment was in exoneration of defendant's original liability.

Peter sold to Lewis, the defendant, expressly subject to the mortgage, and mortgage money. Defendant was no doubt bound to indemnify Peter, his vendor. *Coote on Mortgage*, page 476: "Every person purchasing an estate in mortgage, is bound to indemnify the vendor against the mortgage debt; and as a covenant by the purchaser with the vendor, for the payment of the debt, is no more than a covenant of indemnity, it consequently is an indication that his personal estate shall become the primary fund for its discharge; nor, under such a covenant, is the purchaser, or his executor, liable to an action at law by the mortgagee: *Butler v. Butler* (5 Vesey, 535).

Now, as defendant's position with his vendor Peter was

merely that he must *indemnify* Peter against the mortgage, there was no *debt* existing between them, and *no money* which Peter could demand from defendant; nor was defendant, as purchaser of the mortgaged estate, thereby liable to an action for the payment of *any money* to the mortgagees. As Tindal, C. J., says, in *Hunter v. Hunt* (1 C. B. 302), "To entitle you to maintain this action, you must shew not only that the money was paid to defendants use, but that it is an absolute, liquidated, and ascertained sum."

The most favourable way to place plaintiff's claim is this: "I hold the estate of a man whom you were bound to indemnify against the claim of a third person. I have paid that claim: it has cost so much to pay it, therefore such money is so much money paid to your use." The answer, I think, must be against this claim.

Apparently the most obvious relief to be sought by plaintiff, would be on the implied covenant in the life lease, not as he has framed his case here. There are several cases to the effect that when there is a special contract between the parties, there is no implied assumpsit.

In *Barber v. Harris* (9 A. & E. 535) Lord Denman says: "The only question in this case is, whether, under the circumstances, an action of covenant could be maintained upon the indenture of assignment from defendant to plaintiff, for if it could, no action of assumpsit, upon an implied promise to indemnify, could lie. This doctrine is clearly established in many cases. * * It is said this indenture does not contain any express covenant to indemnify against rent due to superior landlord, nor for quiet enjoyment. But if plaintiff be disturbed in his possession, which he is when distrained upon for rent, an action of covenant will lie upon the word "grant," in the indenture of assignment, &c." He cites *Schlenker v. Moxsey* (3 B. & C. 789): "No action of assumpsit can be maintained in this case on any implied promise. The parties made an express contract by deed: that excludes any implied promise. If the plaintiffs were interrupted in the quiet

enjoyment of the premises, covenant would lie on the demise."

The subject is discussed very fully in 1 Sm. L. Cases (Edn. of 1867), pages 147 to 160, *et seq.*, Notes to *Lamp-leigh v. Barthwaite*.

GWYNNE, J.—When the plaintiff paid the mortgage to the Trust and Loan Company, which mortgage the defendant was under no legal obligation to pay, although he was liable in equity to indemnify Peter Snyder therefrom, the plaintiff must be taken to have paid the amount to relieve his estate for the life of Peter, of which he was seised, and not to the use of the defendant. When Peter Snyder conveyed to Lewis Snyder, subject to the mortgage, the latter became liable to indemnify the former against the mortgage, and when Lewis executed the life lease to the father, that contained an implied covenant for quiet enjoyment which he could enforce against Lewis, if ever disturbed by the mortgagees, that implied covenant passed by the assignment of the lease to the plaintiff, and to that covenant he must have recourse to indemnify him for the amount paid by him to the mortgagee in protection of his term.

GALT, J., concurred.

Rule discharged.

IRWIN V. THE CORPORATION OF MARIPOSA.

*Municipal corporations—Undertaking to indemnify officer for lawful acts—
Not liable for unlawful acts.*

Held, that the fact of a municipal council having undertaken to indemnify an officer for *lawful* acts done in his official capacity, does not entitle him to look to them for indemnity against the consequences of unlawful acts, as for instance, in this case, of a wrongful distress; and that plaintiff could not be allowed to impeach the judgment of a competent Court by which he was held to be a wrongdoer.

DECLARATION, that defendants, by certain by-laws, did, amongst other things, declare that the Inspector of Licenses for said Township of Mariposa, should be fully indemnified for all lawful acts done by him as such Inspector, and plaintiff was duly appointed such Inspector, &c., and, in pursuance of his duty, as such Inspector, laid an information before Justices, &c., that one J. Sheehy had been selling liquor without license, and said Sheehy was convicted and fined with costs, and plaintiff, in pursuance of his duty, caused a distress warrant to be issued, &c., &c., whereunder a levy was made on Sheehy's goods, &c., &c., and the fine paid to proper officer of defendants: that Sheehy impleaded plaintiff in the 5th Division Court, &c., for an alleged wrongful act or distress of his goods, which alleged wrongful act was not caused by the improper conduct of the plaintiff; and plaintiff then applied to defendants to indemnify him against said proceeding, in accordance with the terms of this by-law, and defendants wholly disregarded their duty and obligation, in that behalf, to the plaintiff, and plaintiff was therefore obliged to pay money in defending himself against said claim, and in satisfaction of the moneys awarded against him in respect thereof, and though he had been damnified in respect of said proceedings, yet defendants refused to indemnify him, &c., &c.

Pleas: 1. Not guilty; 2. Plaintiff not damnified; 3. Damnified by his own wrong; 4. Traverse of plaintiff being Inspector; 5. Denial that defendants passed such by-laws; 6. That plaintiff did not, in pursuance of his duty, issue

the warrant, &c., with other pleas, the 10th being that the alleged wrongful act or distress was caused by plaintiff's improper act and conduct.

Issue.

The case was tried at Lindsay, before Wilson, J.

By-law number 113, passed by defendants on 8th March, 1869, declared "that the Inspector shall be fully indemnified by the Municipal Council of the Township, for all lawful acts done by said Inspector in his official capacity. A like provision was contained in a by-law passed in 1865, also in one passed in 1868.

Plaintiff proved his appointment of Inspector; that he had lodged the complaint against Sheehy, who was convicted and fined, and the warrant and distress; the suit brought against him in the Division Court by Sheehy; that he succeeded in obtaining a new trial, and judgment was finally given against him in the Court for damages and costs, which he had to pay to Sheehy.

At the close of the plaintiff's case, a nonsuit was asked on many grounds, two of which only it is necessary to notice. 1st. That the indemnity was only against his lawful acts, and that the Division Court judgment conclusively shewed his conduct to be unlawful. 2nd. That the defendants had no right to pass such a by-law, or apply their funds for any such purpose, and that the duty alleged in the declaration did not arise from the by-law.

Leave was reserved to move a nonsuit, and the case proceeded. A great deal of evidence was offered on both sides, as to all the proceedings between plaintiff, Sheehy, and the defendants, and the jury finally failed to agree.

In Easter Term, *McKenzie*, Q. C., obtained a rule on the leave reserved, to which *H. Cameron* shewed cause, arguing that the ordinary law of principal and agent should apply in this as well as in any ordinary case, and that plaintiff, having acted under defendants' instructions, should have been protected by them. He referred to *Taylor*, Ev. sec. 1495; Municipal Manual, sec. 292.

K. McKenzie, Q. C., contra, contended that the Council had no authority to pass a by-law to indemnify their own officers. The recovery in the Division Court against the plaintiff, at the suit of Sheehy, put an end to his case. The by-law, if it amounted to any thing, was only to indemnify the plaintiff's lawful acts. The judgment of the Division Court against him, for unlawfully seizing the property of Sheehy, was put in evidence by himself, and he was bound by his own evidence. He asked the defendants to indemnify for illegal acts. The judgment of the Division Court is binding on him. He is calling upon the defendants to indemnify him for his own unlawful and highly improper acts. The judgment is binding on him, unless he can shew it was obtained by fraud or collusion: *Plummer v. Woodburne*, 4 B. & C. 625; *Castrique v. Imrie*, 8 C. B. N. S. 405; *Drake v. Mitchell*, 3 East. 131.

He also contended that it was illegal in the plaintiff to issue a second warrant, before the first was properly returned, against the property of Sheehy, and that the plaintiff was acting as a common informer in the proceedings against Sheehy, and not as Inspector of Licenses, and that he improperly interfered without the authority of the Council. He referred to *Lear v. Cadlecott*, 4 Q. B. 123; *Dawson v. Cropp*, 1 C. B. 961; *Piggott v. Birtles*, 1 M. & W. 441; C. S. U. C. cap. 54, sec. 256; 29 & 30 Vic. cap. 51 sec. 259.

HAGARTY, C. J.—Plaintiff seems to be in this difficulty: To prove that he was damnified, he proved the recovery against him, by Sheehy, for a wrongful seizure of goods, and he claims therefrom a right to be indemnified as for a loss arising from a lawful act of his, against which defendants were to save him harmless. The whole cause of his damage is the decision of a Court that he has done a wrongful act, and he says this falls within the protection promised to his lawful acts.

No collusive recovery is suggested. Plaintiff contested the case to the last, and now seeks to re-open the whole

matter, and, in substance, to insist that the judgment against him for a wrong, by a competent Court, is evidence to shew damages resulting from a lawful act.

Apart from the vexed question of estoppel, and *res inter alios acta*, this difficulty seems to be inseparable.

For his lawful acts he required no indemnity. It was not for a lawful act that Sheehy could have recovered against him; it was because his conduct was proved to be unlawful that the recovery was had.

There are cases in which it was held that men were not estopped by judgments, in suits to which they were not parties, and had no opportunity of being heard, or of examining the witnesses. All the cases that I have seen shew an attempt to charge *a defendant* with the amount of a judgment to which he was no party.

In *Pritchard v. Hitchcock* (6 M. & Gr. 166), the rule is laid down. Defendant was surety to plaintiff for his brother paying a bill. The brother, in fact, paid it to plaintiff on the eve of bankruptcy, but his assignees recovered it back by action. Plaintiff then sued the surety. It was held he might still insist that the payment was a good payment, notwithstanding the former recovery against the plaintiff. Tindal, C. J.: "I am of opinion that the judgment in the action by the assignees was not conclusive against the present defendant. He was no party to the action, and could not interfere in it."

Maule, J., states the same view. He says: "In an action on a policy of insurance, against the insurer, where the defence set up is that certain matters ought to have been communicated to the insurer, the jury may find that the matters were material, and find a verdict for defendant. The assured may then sue his broker for negligence in not making the communication, and in that action the jury may think the matters not material, and the assured consequently has to put up with his loss. It is a hardship on him, but there is no remedy for it in the present state of the law."

King v. Norman (4 C. B. 896) is to same effect,

It is not necessary to enter upon the question whether, in an action to indemnify the plaintiff against the claim of a third person, which third person has recovered a judgment against the plaintiff, the defendant, the guarantor, can be heard disputing the correctness of such judgment. My strong impression is that, in the absence of fraud or collusion, the guarantor is bound. I do not, however, here decide the point. It was noticed in *Spence v. Hector* (24 U. C. 277). But the present case is free from difficulty on this head. There is no attempt here to charge the plaintiff Irwin with a judgment to which he was no party. It is he that brings forward the judgment against himself, in a hotly contested suit, to shew that he has sustained damage. It seems to me to involve an absurdity; a man, for example, proved to have acted illegally by the judgment of a Court, carrying his appeal, against such judgment, to the highest tribunal, and ultimately producing the judgment to shew that he was damnified, but that his conduct was still legal.

As was suggested, on the argument, by my brother Gwynne, the plaintiff seeks to enlarge the indemnity to protect plaintiff against the possibly erroneous decisions of the Courts of Justice. It is not easy to understand how the defendants are charged. No contract is stated, but the matter seems rested on a supposed breach of duty.

In the view I take of this point, it is unnecessary to discuss the objection as to the legality of the corporation passing such a by-law, or applying their funds for such a purpose. I think the rule must be absolute to enter nonsuit.

GWYNNE, J.—The law of the land protects and fully indemnifies and saves harmless a public officer, *in all lawful acts* by him done in the discharge of his duties. When, then, a Municipal Council passes a by-law *declaring* that the Inspector of Licenses shall be fully indemnified for *all his lawful acts* in his official capacity, I do not see that it does more than harmlessly *declare* what the law

truly is, or that it can give to the public officer any greater protection than the law itself gives him. When, then, an act of the public officer is impugned, in a Court of competent jurisdiction, as unlawful, and the Court has, as against the officer, conclusively determined, at the suit of the injured party, that the act complained of is unlawful, I cannot see how a judgment so rendered can be appealed to by the officer, against whom the law has pronounced judgment, for the purpose of obtaining from the corporation an indemnity more extensive than the law gives.

GALT, J., concurred.

Rule absolute to enter nonsuit.

MULHOLLAND V. CONKLIN.

Possession of wild land—Statutes of Limitation—Evidence—Admission of defendant's title.

The principle laid down in *Heyland v. Scott*, 29 C. P. 165, and *Davis v. Henderson*, 29 U. C. 344, as to the exercise of acts of ownership over wild land, sufficient to establish a possession under the Statutes of Limitation, recognized and acted upon; and *Held*, that the evidence set out below was sufficient to bring this case within the Statutes of Limitation.

Held, also, that it was no admission of the title of the party through whom defendant claimed, that the party through whom plaintiff derived title had, long after his title by possession had matured, filed a bill in Chancery, against the former, for specific performance of an agreement for sale of the land in question to him; first, because the statements contained in such a bill were not, under *Boileau v. Rutlin*, 2 Ex. 665, evidence; and secondly, because the title was absolute at the time the bill was filed, and could not be set aside by admissions that at some former period the land had belonged to another than the one claiming by possession.

EJECTMENT for south half of lot 19, in 10th concession of Brock, tried before Wilson, J., at Whitby.

The plaintiff claimed title by length of possession; the defendant, under one Luc Reaume, the grantee of the patentee of the Crown.

It appeared that a person of the name of Lane was the original nominee of the Crown, and that before the patent was issued, he agreed to sell to a man named Patterson,

who sold to one Arthur Kelly, under whom the plaintiff claimed.

Kelly was examined as a witness, and stated that he bought from Patterson about the year 1827; that at the time of his purchase he had himself drawn land as an emigrant, lot 19, in 9th concession. After he purchased from Patterson, he did settlement duty on lot 19, in the 10th, and obtained a certificate. The patent was issued to Lane on 15th April, 1829, who on 27th June, 1829, conveyed to one Luc Reaume, through whom defendant made title. Kelly had placed one Beardon on the land in dispute, and built a shanty for him, of which Beardon remained in possession for about $3\frac{1}{2}$ years, when he left. Kelly had fenced in three-quarters of an acre for Beardon, and he chopped on the rest of the lot himself. He fenced the south half of the lot as he cleared it. He stated that he had twenty-five acres cleared on the south half, and that nobody lived on the south half, after Beardon left, but himself. In 1857 he conveyed the whole lot to Messrs. Green & Hawkins, and they made a lease to him for two years. The first man, he said, who ever interfered with him about the south half, was one Dewar, who came with four teams, and five or six men, six years last February, and put a person on as Dewar's tenant. This was consequently about four years after he had sold to Green & Hawkins.

The wife of Kelly was also examined as a witness, and stated: "I was married to him (Arthur Kelly) forty years ago last October. I then went to live on lot 19, in 9th concession; Beardon was then living on lot 19, in 10th concession. Beardon went off the first or second spring after I was married. My husband cropped the lot every year till he sold to Mr. Green: he chopped and cleared on it, and he gave out jobs to young men to chop on it; he gave it out different years to have it done. He made no difference between his lot, in the 9th, and this lot."

There was a good deal of evidence to the same effect given by other witnesses, which satisfied the learned Judge that Kelly was in possession of the south half from about

the year 1827, until 1865, when Dewar entered, as already stated.

The learned Judge found a verdict for the plaintiff.

M. C. Cameron, Q. C., obtained a rule *nisi* to enter a verdict for defendant on leave reserved, or for a new trial on the law and evidence, and for misdirection.

C. S. Paterson, Q. C., and *John Paterson*, shewed cause. The title by possession was fully established. The character of the possession of Arthur Kelly, and the fact that his possession included the whole of the half lot in question, was satisfactorily shewn by himself and the other witnesses of plaintiff. The cases of *Davis v. Henderson*, 29 U. C. 344, and *Heyland v. Scott*, 19 C. P. 165, settle the law as applicable to the character of his possession. The fact that Luc Reaume, while entitled to the land, knew of Kelly's possession, is clearly shewn, both by Kelly's evidence, and by Luc Reaume's letter to Mercer. Kelly supposed that the conversation of which he speaks took place before the patent was issued; but a reference to the patent, and to the deed from the patentee to Luc Reaume, and to the letter to Mercer, shews that Kelly was mistaken, and that the conversation was after the issue of the patent. Then, as to defendant's contention that Green and Hawkins, by filing their bill for specific performance of the alleged contract between Luc Reaume and Kelly, had admitted title in the heirs of Luc Reaume, so as to take the case out of the Statute of Limitations, there are two answers; first, a bill in equity is not evidence against the plaintiff: *Boileau v. Rutlin*, 2 Ex. 665: and secondly, the twenty years' possession was complete before the filing of that bill.

M. C. Cameron, Q. C., and *McMichael*, Q. C., contended that the possession by Arthur Kelly of a lot in a state of nature, was not sufficient against the patentee or his assigns; that the letter said to be of Luc Reaume was not proved to be in his handwriting, and that it did not mention what lot Kelly was in possession of; that at any rate

the possession of Kelly could only cover the land actually occupied; that there was no evidence of the bond said to have been given to Patterson, or of the assignment. They referred to *Doe Kingsbury v. Stewart*, 5 U. C. 108; *Stewart v. Murphy*, 16 U. C. 224; *McDonald v. McIntosh*, 8 U. C. 388; *Heyland v. Scott*, 19 C. P. 165.

GALT, J.—A careful perusal of the evidence satisfies me that the decision of the learned Judge was correct. The contention, in point of law, on the part of the defendant, was that, admitting Kelly had possession of a portion of the lot, such possession would not confer a title to any other part of the lot than that actually occupied by him, which, for the purposes of this discussion, we may take to have been about twenty-five acres. But it is plain that he claimed not only the south half, but the whole lot, and in 1857 conveyed the whole lot to Green and Hawkins. There was evidence to shew that this was unquestionably the case, and it was for the learned Judge, who tried the case without a jury, to say what effect that evidence had on his mind. In *Heyland v. Scott*, in this Court, the Chief Justice, in giving judgment, says: "We are not prepared to hold that unclosed wood land, in this country, can never be the subject of a twenty years' possession. If fencing and cultivation can alone constitute a possession, then title to wood-land can never be acquired against the true owner. To put an extreme case, if a man posted caretakers or sentries to patrol the bounds of an unfenced lot, rigidly driving off all trespassers, and thus preserving the whole for the exclusive use of their employer, could it still be said that twenty years of such proceedings would not bar the true owner?"

After the decision of *Heyland and Scott*, *Davis v. Henderson* came before the Court of Queen's Bench. That was a case in which the jury found that the defendant had held and taken possession of the whole 100 acres, and the defendant had a verdict. This verdict was moved against, on the ground, among others, "that the evidence shewed that there had been no actual possession of, at least, a great

portion of the land in question, &c., and for misdirection of the learned Judge in telling the jury that possession of one part of the land drew with it the whole of the remainder of the land." In giving judgment, Wilson, J., says (after referring to the case of *Heyland v. Scott*): "In my opinion, when any person enters on a lot, or half lot, or on any defined piece of land, wild, or partly cleared and partly wild, under colour of right or otherwise, and holds possession for the statutable period, the question for the jury should always be, as to the wild land, whether the person, whose possession is in question, has held or claimed the wild land (for there is no misunderstanding as to the cleared land) as owner, and has used it in like manner as the owners of land, who have uncleared and unenclosed portions on the lots they occupy, usually use their wild lands; by such acts of ownership as owners are accustomed to exercise; or whether the acts of the person in question have been the acts of a mere trespasser, not done, and not intended to have been done, in the assertion of right, title, or ownership." Morrison, J., in the same case says: "It seems to me that actual possession of a lot, partly cleared and partly uncleared, as in the case before us, can only be evidenced by the actual exercise of such right and dominion over the whole as the true owner would visibly exercise himself, and that it is for the jury to say whether, from the circumstances attending such occupation, they are satisfied that the party claiming was in possession of the land in question."

I consider that until the law, as laid down in the above cases, shall be declared to be erroneous by a Court of appellate jurisdiction, it is now established that the question of the exercise of acts of ownership, as evidencing a possession of wild land, is one for the jury, and that if the evidence satisfies them, that the person setting up the Statute has been so in possession, then that the Statute affords a protection as well to the possessor of the wild land as to the cleared. Speaking for myself, I fully concur in the principle of the above cases. In the present case, there can be no doubt that Arthur Kelly claimed title to,

and acted as if he were the true owner of, the whole lot. Acting on the principle above stated, we should not, in my opinion, have interfered, had this case been tried by a jury; and the finding of the learned Judge is certainly entitled to as much consideration and respect. I am of opinion, that, as regards this point of the case, our judgment should be for the plaintiff.

Although the rule does not distinguish the different objections to the ruling of the learned Judge, there were two others argued before us: first, that the Statute had no application to the case; and second, that there had been an admission of the title of the person through whom the defendant claims. The evidence shewed that the original nominee of the Crown was one Lane; that before the patent issued, Lane agreed to sell to one Patterson, who sold to Arthur Kelly. This land was subject to settlement duties, as appears by the patent. These settlement duties were done by Kelly, and the patent issued to Lane, on 15th April, 1829. On 27th June, 1829, Lane executed a conveyance to Luc Reaume, under whom the defendant claims. On the 6th July, 1829, Luc Reaume wrote a letter to a person named Mercer, in which the following passage occurs: "I wrote this morning to Mr. James Bethune to forward you Lane deed, you can offer the lot to Kelly, the man who is now on *the*. I empower you to sell the lot of land to Kelly, or any other person. I told Kelly he should have the lot of land, &c." It is to be observed that the word "lot" is omitted, where Luc Reaume refers to Kelly; but I think that no doubt can be entertained as to the meaning of the writer. It was, however, contended by the learned counsel for the defendant, that we might read it as if the writer had said, "the lot 19, in 9th concession," because Kelly was living on the lot, and consequently it did not follow that Luc Reaume had any notion that Kelly was in possession of the lot 19, in 10th concession, after patent had issued. I think that such a construction would not only be very strained, but would be contrary to the evidence. There is no evidence what-

ever that Luc Reaume knew that Kelly was the owner of lot 19, in 9th concession. Kelly states: "I went to the 'Three Brothers,' a tavern, in Toronto, and I saw a Frenchman there of the name of Reaume. He and I talked of *this* land; he said to me, he would give me money to follow Lane, and put him in gaol, and that I might follow him for twelve years. Lane had taken £100 from Reaume. Lane had been peddling for Reaume, and had gone off with the £100. The Frenchman said he thought worse of Lane for giving him the transfer before the patent, than about the £100, and when he had before sold it, too. I told Reaume I was the owner of the lot, for I had bought it from W. Patterson, and Patterson had bought it from Lane, having paid Lane for it in chopping. *I told Reaume I was occupying the lot.*" There is no other evidence on this point, and I consider it impossible to read Luc Reaume's letter to Mercer, which was written on 6th July, 1829, without coming to the conclusion, that the lot which he therein states to be in the occupation of Kelly, was the lot referred to. This letter of 6th July was written after the deed from Lane to Luc Reaume, and proves that at that time Luc Reaume knew that Kelly was in possession.

The third objection remains to be considered.

It appeared that on 12th August, 1858, Green, Hawkins, and Kelly, filed a Bill in Chancery against certain persons claiming to have derived title from Luc Reaume, praying for a specific performance of an agreement which the bill alleges had been made by Luc Reaume with Kelly, to sell him this land. The defendant relied on this as an admission of title on the part of the plaintiff's grantor. I think this objection fails for two reasons; first, because the statements in a Bill in Chancery were not evidence, as was laid down in the case of *Boileau v. Rutlin* (2 Ex. 665); and second, because, from the view I take of the evidence, the title of Green was absolute at the time when the bill was filed, and a title once fully acquired, by length of possession, cannot afterwards be set aside by admission that at some previous period the land had belonged to some other person than the party claiming title by possession.

GWYNNE, J.—The manner in which Arthur Kelly, under whom the plaintiff derives title, appears to have come into possession of the land in question, was, according to his own evidence, in virtue of a contract of purchase entered into with one Patterson, in 1827, who had entered into a contract of purchase with one Lane, who afterwards became the patentée of the Crown, and that Arthur Kelly performed the settlement duties, in virtue of which the patent issued to Lane. I concur in opinion with the learned Judge, who tried the case without a jury, that there was ample evidence to establish that Arthur Kelly retained actual possession of the whole of the land claimed, being the south half of the lot, continuously, as owner, and exercising the rights of ownership over the whole of the land claimed, from 1827 until 1865. Mr. Cameron, however, contended that there was no sufficient evidence of the patentee of the Crown, or Luc Reaume, his assignee, having (*after* the issuing of the letters patent) had notice of such possession by Arthur Kelly, so as to cause the Statute of Limitations to begin to run, within Consolidated Statutes of Upper Canada, ch. 88, sec. 3. His contention was, that Arthur Kelly's evidence shews that the notice spoken of by him, as having been given to Luc Reaume, was *before* the issuing of the letters patent, and upon the authority of *Stewart v. Murphy* (16 U. C. 224), he contended that such notice was insufficient, and he further contended that the letter of the 6th July, 1829, from Luc Reaume to Mr. Mercer, as it did not state the number of the lot, cannot be treated as supplying evidence of Luc Reaume's knowledge of Arthur Kelly's possession, when that letter was written. Now, whether the notice spoken of by Arthur Kelly, in the conversation which he had with Luc Reaume, was before or after the issuing of the letters patent, was a question of fact for the Judge, who tried the cause, to determine as a jury; and although true it is, that Arthur Kelly, now an old man, upwards of ninety years of age, says that the conversation referred to, and which must have taken place about forty

years ago, at least, did occur before the issuing of the letters patent, still, I think the true and proper inference to draw from the whole evidence, is that in that particular he was mistaken, and that it occurred *after* the issuing of the letters patent. There does not appear to be any reason for supposing that Arthur Kelly had any knowledge, in fact, as to the time when the letters patent issued; his referring the period of his conversation with Luc Reaume to a period anterior, is plainly attributable to the observation which, he says, Luc Reaume made, as shewing the ground of his entertaining bitter feelings against Lane, namely, that Lane had executed the deed to him before the letters patent had issued. Now from this observation it is apparent it must have been made after the execution of the deed by Lane to Luc Reaume, which being produced, bears date the 27th June, 1829. We cannot assume that there was any other deed; but whatever Luc Reaume may have thought as to the period when the letters patent issued, or however ignorant he may have been of that fact, it now appears by their production that they had issued on the 4th May, 1829, so that it is apparent that when Lane conveyed to Luc Reaume, the letters patent had issued. The explanation of the difficulty perhaps is, that at the time when Luc Reaume was conversing with Arthur Kelly, the letters patent had not been taken out of the office, or that Luc Reaume did not know that they had been. If, however, we must, as I think we must, without doubt conclude, that the conversation relied upon as giving notice to Luc Reaume, of Arthur Kelly's possession, occurred after Lane had executed the deed to Luc Reaume, we see that in fact it was after the land had been granted to Lane, and when Luc Reaume, as assignee of the patentee of the Crown, was entitled to the land. This makes it unnecessary to enquire whether the letter of the 6th July, 1829, contains evidence of Luc Reaume having then knowledge of Arthur Kelly's possession. I confess that, acting as a juror, I have no doubt upon this point either, nor that the proper inference to draw is, that the lot referred to in

that letter is the lot which Luc Reaume purchased from Lane, namely, this land. The letter, as it appears to me, contains within itself clear evidence that the writer intended to refer to Kelly as living on the *lot*, though the word "lot" at that place is left out. The letter refers to Lane's deed, the lot covered by which, Mr. Mercer is authorized to sell to Kelly, about which Kelly swears he had had conversation with Luc Reaume, informing him he was on the lot, claiming it as his own, under his agreement with Patterson. The expressions in the letter are, "You can offer the lot to Kelly, the man who is now on the, I empower you to sell the lot, and transfer the lot of land to Kelly. I told Kelly he should have the lot of land for \$236." Now this peculiar manner of repeating the words "the lot," so frequently, in two sentences, is convincing, to my mind, that the word "lot," and not "opposite lot," is what is left out in the one place where the sentence is imperfect, and this is the inference which a jury should draw. Knowledge of Kelly's possession is then brought home to the assignee of the patentee of the Crown, after the issuing of the letters patent, as early as 1829; but Mr. Cameron contends that this is of no avail, for that the knowledge, to bar the rights of the patentee, his heirs, and assigns, must be acquired *after the passing of the Act*, 4 Wm. IV. ch. 1, in 1834, and he relies upon *Stewart v. Murphy*, in support of this position. But that case leads to no such conclusion; on the contrary, what the Chief Justice, Sir John Robinson, there says is, "If this construction of the Statute is the correct one (namely, that the knowledge should be possessed after the issuing of the letters patent granting the land), which we think it is, then it was necessary to shew knowledge by Bawdin, or some one claiming under him, after 21st June, 1824, when the patent issued, that the defendant Murphy had gone upon the land, and there was no proof of that which was necessary to be shewn, before the Statute could begin to run." He here plainly implies that it would have been sufficient to have shewn knowledge in the patentee,

or some person claiming under him, at any time after 21st June, 1824, or ten years before the Statute, 4 Wm. IV., was passed. The reading of the Statute is, as it appears to me, plain upon this point. Before the Statute, twenty years adverse possession was a bar, whether the grantee of the Crown, or any person claiming under him, had knowledge of that fact or not, and whether the land had been entered upon by the grantee of the Crown, his heirs, or assigns, or not; whether it was wild, uncleared land, or not; but the Statute comes in, and says, in respect of wild land, upon which the grantee of the Crown, his heirs, or assigns, had not actually entered, by residing upon or cultivating some portion thereof, the lapse of twenty years shall not bar the right of the grantee of the Crown, his heirs, or assigns, unless it can be shewn that the grantee, or person claiming under him, *while entitled* to the lands, *had* knowledge of the same being in the actual possession of such other person; but the right to bring the action will be deemed to have accrued from the time that such knowledge *was* obtained. This language plainly conveys that the period from which the Statute of Limitations is to be deemed to run, is from the date when the knowledge *was* obtained, whether before or after the passing of 4 Wm. IV. I see no ground for disturbing the verdict of the learned Judge.

HAGARTY, C. J., concurred.

Rule discharged.

McKENZIE V. NORTHROP ET AL.

Promissary note—Notice of dishonour—Evidence.

In an action against the executors of a deceased indorser of a note, it appeared that some of the notices of dishonour were addressed, "Administrators of William Stinson's estate, Belleville, Ont.," while others were similarly addressed "Canifton," the latter having been testator's place of residence. It was proved that the notices were posted in due time, and as to the receipt of them, one of the executors stated that he had received two, one several weeks after the maturity of the note, from testator's widow, who got it at Canifton, the other from his executor; but whether a day or a fortnight after protest, he could not say, while his co-executor stated that he had never received any notice at all, but was shewn one by the other as having been received by him.

Held, that the reasonable inference to be drawn from this evidence was that the notice had been received in due course.

THIS was an action against the executor of the late William Stinson, on a note endorsed by the testator.

The defence relied upon was that the defendants had not due notice of the dishonor of the note.

The case was tried before Wilson, J., at Belleville, without a jury. The protest was put in, and, from it, it appeared that two notices of dishonor were given on the day the note fell due, addressed, "Administrator of Wm. Stinson estate, Belleville, Ont." There were other notices also forwarded in the same form, but addressed to Canifton, at which place the testator had resided. The defendants were both examined as witnesses. Northrop's evidence was: "I am one of the executors, and a defendant; the widow of the late Mr. Stinson brought me a notice which had been addressed to the representatives of the estate of testator, at Canifton; she brought it to me in February some time, about a fortnight after the note was due; and my co-executor also brought me a notice, about the same time, which he had got; he told me he had got the notice from the Post Office, Belleville, which was addressed to the administrators of the estate of the late Mr. Stinson. Probate was granted 22nd June, 1871. I got my notice of dishonour, not from the Post Office, but from my co-executor, Mr. Kerr. Can't say when I got it; it may have been day after protest, or a fortnight after; can't say which it was."

Kerr's evidence was : "I never got any notice of dishonor of the note from the Post Office. Mr. Northrop shewed me in his office a notice he had got. I got no notice from Mrs. Stinson. There are no other executors of Stinson's estate, but Mr. Northrup and myself, and we live in Belleville."

It was established that the notices were put into the Post Office in due time.

The learned Judge entered a verdict for the plaintiff, reserving leave to defendants to move to enter a verdict for them.

In Easter Term, *Wallbridge*, Q. C., obtained a rule to this effect, to which *Read*, Q. C., shewed cause and submitted that the notice of dishonor was sufficient; that the evidence shewed that the protest was received by the legal representatives of Stinson, deceased, the endorser, in a reasonable time after maturing of the note. Northrup swore that he might have got it a day after maturity of the note. In a case of this kind the Court should not be too rigid, so long as the plaintiffs shewed due diligence; and it was reasonable to hold, on witnesses evidence, and of widow of testator, that the notice was in due time. The question of due diligence was considered in the case of *Leith v. O'Neill*, 19 U. C., 237, and on the authority of that case, plaintiff was entitled to hold his verdict. The learned Judge who tried the case found for plaintiff, and the Court would not review that finding. The case of *Bank of British North America v. Jones et al.*, 8 U. C. Q. B. 86, was more a dictum than authority.

He also referred to *Berridge v. Fitzgerald*, L. R. 4 Q. B., 639; *Gladwell v. Turner*, L. R. 5 Ex. 59; *Siggers v. Brown*, 1 M. & Rob. 520.

Wallbridge, Q. C., contra. No notice was in fact given to the defendants. Notices were addressed to them as executors of Stinson, but to the wrong Post Office. The question is, whether the notices mailed are sufficient to satisfy the law.

The defendants both reside in Belleville, and are well known. From the superscription, the responsibility of delivery to the proper person was thrown upon the postmaster. This is not a sufficient direction of the notice: *Bank of B. N. A. v. Jones*, 8 U. C. 86. The plaintiff was aware of the death of Stinson, as is shewn by the address of the notices, which are addressed to the personal representative. If plaintiff was not bound to notify on the very day the note was due, or the next day, still plaintiff should shew diligence: *Bateman v. Joseph*, 12 Ea. 433. This was not shewn. The note was due 28th January, 1872, and probate had been granted on the 30th June previously: all parties resided in Belleville, and by making very slight inquiry, the names of the executors could have been ascertained.

GALT, J.—So far as posting the notices in due time is concerned, the holder, it was proved, had discharged his duty to the endorser; but the question is, does the evidence shew that they were received in due time? As a general rule, all that the holder is required to do, is to cause a notice of dishonor, properly addressed, to be put into the post office on the day when the note is dishonored; he is not responsible that the endorser shall receive it; but in a case like the present, I take it, the rule is, that the holder must shew not only that the notice was put into the post office in proper time, but that it came to the hands of the defendants in proper time; that is to say, in this instance, on the day after the protest was made. The notices were addressed, “Administrator of William Stinson’s estate, Belleville.” Such an address would be clearly insufficient in the opinion of the learned Judges who decided the case of *Bank of B. N. A. v. Jones* (8 U. C. 89), unless it was shewn that it came to the custody of the parties for whom it was intended; but I gather from the opinion of the learned Chief Justice, Sir John Robinson, that if such was proved to be the case, then the notice would be sufficient. In that case the notice was addressed,

"To the Executrix or Executor of the late Mr. Justice Jones, Toronto. The Chief Justice says: "Taking the view which we do of the case, as to the effect of the transaction in discharging the endorsers, and entitling them to consider the notes as paid, it is of no consequence to consider the objection to the insufficiency of the notice of non-payment of the note; but we have no doubt the objection must have prevailed. It appears that no other notice was posted or sent to either of the executors than the one put in the post office, directed in the manner I have stated, and that could not be sufficient, since we are not at liberty to assume that the post master would take the trouble to enquire who were the executor or executrix for Mr. Jones, or that the matter was so public and notorious that the letter was sure to reach the proper party without delay." No evidence was given that the notice ever did reach the party for whom it was intended, and it is evident that the Chief Justice's judgment turned upon that point.

The question then is, did the evidence, in the case before us, prove that Mr. Northrop received the notice in due time? In my opinion it did. He admits that he received two notices, one from Mrs. Stinson, who had got it at Canifton, and the other at Belleville, as he says, from his co-executor. The former was handed to him several weeks after the note fell due, but he cannot say whether he received the latter the day after the note fell due, or a fortnight after. On the other hand, Mr. Kerr says that he never got any notice from the post office, Belleville, but Mr. Northrop shewed him a notice he had received.

When we consider the discrepancy between the evidence of these two gentlemen, as to the receipt of the notice, coupled with the fact that such a notice was actually received, we may, I think, assume that Mr. Northrop is mistaken in thinking that he received the notice from the hand of Mr. Kerr. All the notices were sent through the post office, and it appears to me that the reasonable solution of this difference of opinion is, that Mr. Northrop received the notice through the post office. Assuming this to be the correct

state of the case, it follows that, as Mr. Northrop cannot say whether he received it the day after it was put into the post, or a fortnight after, the reasonable inference to be drawn is, that he received it in due course.

We cannot avoid referring to what appears to have been a singular want of diligence in not enquiring into the fact whether or not probate had been granted in this case, and to whom, so that the notices might have been addressed to the executors by name. It has fortunately been proved that the notice came to the hands of the party entitled to receive it in due time, otherwise, on the authority of the case above cited, the plaintiff would have lost her remedy against these defendants.

The case was tried without a jury, and the learned Judge found a verdict for the plaintiff. Had a jury been summoned, and given a similar verdict, we should not have disturbed it, and we think that the finding of the learned Judge is entitled to at least as much respect.

Rule discharged.

LONG V. MONCK ET AL.

Trespass—Damages.

Defendant, being guardian in insolvency to the estate of one W., seized goods in the plaintiff's possession exceeding \$800 in value, which the plaintiff claimed under a purchase from W., made about two months before W. absconded.

The circumstances attending the alleged purchase were very suspicious. The plaintiff had been working for W. as a labourer, having no capital, and he had given his notes for the purchase money, with an agreement to deposit all receipts from sales to the credit of such notes weekly, and that W. might retake the goods on default. It was sworn too, that when the seizure was made, he said they should at least allow him wages. The jury were told to find for defendant, if they considered the transaction to be fraudulent, but they found for the plaintiff, giving only \$65: *Held*, that admitting defendant to be a mere wrong-doer, the jury, with a view to damages, might take into consideration the true nature of the plaintiff's interest, and a new trial was refused.

1st count, trespass to realty, and taking fixtures and goods; 2nd count, charging a like entry and seizure under

a pretended claim that the goods belonged to one Wortley, and that defendants were entitled to eject plaintiff, with special damage ; 3rd count, trover.

Pleas, not guilty ; traverse of plaintiff's property ; leave and license.

The case was tried at Chatham, before Hughes, County Judge (acting for Galt, J.)

It appeared that one Wortley carried on business as a grocer, &c., and that plaintiff had been working for him as a laboring man, at \$1 a day, and had no capital. On 27th July, 1871, a written agreement was made between them by which Wortley sold to plaintiff his stock for \$1,278, he giving his notes, each for \$639, at two and four months ; plaintiff to sell the goods, and weekly deposit the cash receipts in Merchants' Bank to the credit of the notes, till paid, with power to Wortley to inspect books, and to enter and take possession, if plaintiff should fail in his payments or remove the goods. This arrangement was made at Wortley's suggestion. An attachment in insolvency was issued against Wortley on 25th September, and the defendant Monck, who was official assignee at Chatham, was made guardian by the sheriff. The latter had put Monck in possession of some of Wortley's property, but not of this property ; and Monck seized this on the 29th September last, at the instigation and on behalf of the creditors, and the estate of Wortley was reaping the benefit of them.

The jury were told that plaintiff's possession was sufficient as against a wrong-doer : that Monck had no right, as guardian, to seize without process, even if they were Wortley's goods : that if the plaintiff's claim was only colorable or fraudulent, under a pretended sale, and the property in fact Wortley's, and if plaintiff were a mere servant, then possession would be Wortley's possession, and plaintiff could not recover : that a mere fraudulent arrangement between them would not entitle him to recover even against these defendants.

The jury found for plaintiff, \$65, the value of the goods seized being \$800 or \$900.

In Easter Term, *C. Robinson*, Q.C., obtained a rule to set aside the verdict on the law and evidence, and because contrary to the Judge's charge, and for smallness of damages; and also because the verdict was inconsistent with the evidence; and for misdirection in telling the jury that if the plaintiff's claim was merely colorable, and he was the servant of Wortley, the owner, he could not recover, and that if the alleged purchase was fraudulent, plaintiff could not.

H. MacMahon (of London) shewed cause. It appeared by the evidence that Robert Wortley, whose goods defendants claimed they had seized, carried on two stores in Chatham, and on 27th July, 1871, he made a sale, or pretended sale, of the goods in one of these stores to plaintiff. Wortley absconded about the 20th September, and an attachment issued in insolvency against Wortley's estate on 25th September, and defendant Monck, as official assignee for the county of Kent, was placed in possession of the goods, as guardian, under the Insolvent Act. Under sec. 25, Insolvent Act of 1869, Monck, as guardian, was obliged to perform all the duties of an official assignee to whom a voluntary assignment is made. See also secs. 10 and 31, and *Burns v. Steele*, 2 U. C. L. J., N. S., 189. The jury, in fact, found that these goods were not the plaintiff's, but Wortley's, and they were justified in doing so from the evidence, which declared that plaintiff was merely a porter in Wortley's store for a few weeks; that he had no means, and Wortley was aware of that fact; that the inventory of goods in store was not left with plaintiff; that the money was not paid into the bank according to the terms of agreement; that goods were from time to time procured from Wortley's other store by plaintiff, and no invoices were furnished. These were facts from which the jury might easily infer fraud, and they did so, and gave a verdict based on the value of the fixtures in the store, which belonged to plaintiff. The Judge's charge was correct, and the question as to property in the goods was fairly left to the jury; and, if so, the Court will not disturb the verdict: *Hyde v. Gooderham*,

6 U. C. C. P. 539; *Scott v. Watkinson*, 4 M. & P. 237; *Grimm v. Fisher*, 25 U. C. R. 383. The rule is, that the verdict will not be disturbed unless clearly wrong: *Hooper v. Christie*, 14 U. C. C. P. 117; *Miller v. Ball*, 19 U. C. C. P. 447.

There was no misdirection. The Judge told the jury that if the plaintiff and Wortley connived together, and this sale to plaintiff was a sham, then that the goods were still Wortley's, and plaintiff had no right to recover: *Harrison v. Dixon*, 12 M. & W. 142; *Jeffries v. Great Western R. W. Co.*, 5 E. & B. 802; *Ashley v. Minnitt*, 8 Ad. & E. 121.

Robinson, Q.C., contra. The defendant was a mere wrong-doer. As guardian, he had nothing to do with Wortley's goods unless placed in his custody by the sheriff: Insolvent Act of 1869, secs. 20, 23, 25; and here he was wholly without excuse, for he took upon himself to seize these goods after the sheriff had refused to do so, or to give him any authority. As a wrong-doer then, having taken them out of the plaintiff's possession, he cannot set up the rights of Wortley or his creditors, and he is liable for their full value: *McDougall v. Smith*, 30 U. C. R. 610, and the cases there cited. The jury were told that fraud, as between Wortley and the plaintiff, would disable the plaintiff from recovering—not that they might enquire into the transaction in order to ascertain the true nature and value of his interest, with a view to the amount of damages—and this was misdirection. It is true they were directed that possession was sufficient against a wrong-doer, but it was added that if the plaintiff was Wortley's servant only, his possession would be Wortley's, and he could not recover; and this latter direction also was incorrect. A servant may recover the full value of goods wrongfully taken from him. The verdict, besides, is absurd, and inconsistent with the charge. The substantial and only question submitted and tried, was whether the transaction between the plaintiff and Wortley was *bonâ fide*. There was no dispute as to the measure of damages, and no question made as to the

fixtures apart from the rest, and the value of the goods was beyond question over \$800. The jury have found for the plaintiff, thus affirming the *bona fides* of the sale, and have given him only \$65. This deprived him of the goods and leaves him liable on the notes to the bank, and such a verdict should not stand.

HAGARTY, C. J., delivered the judgment of the Court.

Apart from all legal questions, had the jury found for defendant on the evidence adduced, I do not think we should interfere with the verdict. The case was very suspicious.

The jury gave a small verdict to plaintiff. It was found that when the goods were seized, he said he hoped he would be allowed wages for the time he had been at the store, some couple of months, and it is not unlikely the verdict was intended to compensate him for actual services. Wortley absconded about the 20th September; and altogether the transaction has a most doubtful appearance.

Mr. Robinson strongly urged that, as the guardian acted unlawfully in seizing as he did, without process, and not having been put in possession of these goods by the sheriff, he was wholly a wrong-doer, and can urge nothing in mitigation or reduction of damages. It appears to me that is not correct. In *Cameron v. Winch* (2 C. & K. 264), in trespass and trover, plaintiff held a workshop under defendant, and after tenancy determined by notice to quit, defendant seized his goods under a distress for rent. The head landlord had previously put in a distress, and on that occasion plaintiff furnished his brother and a friend money to pay the landlord and redeem the goods. They both swore they were merely ostensible owners, in order to protect plaintiff from his creditors. Erle, J., said the plaintiff must have a verdict, yet, as the transaction was tainted with fraud, &c., &c., the jury might take into consideration what they thought was the plaintiff's real and *bonâ fide* interest in the goods in question, and make that the measure of damages, and not their full value. The

jury found the full value to be £21, and damages one farthing. See also the cases cited in *Mayne on Damages*, 214; *Brierly v. Kendall*, 17 Q. B. 937; *McAulay v. Allen*, 20 C. P. 417; *Chinery v. Vial*, 5 H. & N. 288,—where the principle is clearly laid down.

Assuming that the facts shewed the claim of plaintiff to the goods to be fraudulent as against Wortley's assignee and creditors, the law would be in a curious state if, when, after Wortley's absconding, an irregular seizure were made, but in such a way that it really enured to the benefit of the creditors and future assignee, in whom all Wortley's estate vested, that a plaintiff like the present could recover the full value. He may be liable for the notes given by him, but he is not liable over to his vendor, Wortley, all whose rights have passed to his assignee. Wortley, by the contract with plaintiff, had a right to retake the goods if plaintiff made default in payment of the notes.

The trespass sued for was on 29th September; the following day the first note was protested for non-payment, and Wortley, if there, could have taken the goods, and if he had then an assignee, the latter, if he affirmed the sale, could have exercised the same rights.

We are quite satisfied that in all cases like the present, the true nature of the plaintiff's interest in the property taken may be enquired into. His loss is, in nearly all cases, commensurate with his interest. It is quite true that in many cases a mere bailee can recover the full value. The principle of such cases stands on a clear ground. Of course we use this language on the assumption that the jury by their verdict recognized plaintiff's right to recover something, but not the full value of the goods; and in that view they apparently held the transaction with Wortley to be void. Had they found a purely nominal verdict for plaintiff, we should not have disturbed it.

Rule discharged.

THOMPSON v. BENNETT.

Proper custody of ancient deeds—Presumption of identity—Orders in Lunacy under Imperial Act—Proof of deeds—Notice under sec. 17 of Ejectment Act—Prior possession as title in ejectment—Comparison of handwriting.

1. Deeds purporting to be upwards of 30 years old were produced from the custody of the solicitors of plaintiffs, who claimed as trustees, and one of which solicitors was a plaintiff in the action. The plaintiffs claimed under these deeds, through several mesne conveyances. The solicitor-plaintiff had once recovered judgment in ejectment for the land in question, as one of the three trustees. *Held*, that the deeds were produced from the proper custody to entitle them to be received in evidence as ancient documents.
2. Lands were conveyed, in 1804, by deed to W. R. By a deed poll endorsed upon the deed of 1804, and dated in 1823, W. R., described as "the within named W. R.," granted the same lands to trustees of a marriage settlement executed in 1820, under which plaintiffs claimed. *Held*, that the W. R. who executed the deed poll would be presumed to have been the grantee of the deed of 1804, notwithstanding recitals in other deeds, produced by the plaintiffs as part of their chain of title, tending to shew that the grantee of the deed of 1804 was dead before 1820.
3. The Court is bound to take notice that the Imperial Act, 11 Geo. IV. and 1 Wm. IV. ch. 60, enables lands in this Province, held in trust by a person of unsound mind, to be conveyed by a committee appointed by the High Court of Chancery in England.
4. For the purpose of proving the execution of deeds, a witness, who was not the witness to the deeds, went to the persons by whom the deeds purported to have been executed, who admitted to him that the signatures were theirs, and who wrote their names in the presence of the witness, who had no previous acquaintance with them or with their handwriting: *Held*, that evidence of these admissions and of the belief of the witness, from the knowledge of the handwriting thus acquired, that the signatures to the deeds were genuine, was good evidence to go to a jury and, in the absence of any contradictory evidence, sufficient to warrant a finding, that the deeds had been duly executed upon the respective days upon which they purported to have been executed.
5. *Seemle*, that an objection to the absence of proof of an order in Chancery, recited in a deed executed under the order, but which order is not otherwise proved, may be met by a notice under sec. 17 of the Ejectment Act.
6. And *Held*, that irrespective of the objections raised to the proof of their paper title, the plaintiffs had sufficient title as against the defendants who had entered upon the peaceable possession of the plaintiffs, or their grantors.
7. Per GWYNNE, J.—A deed may be proved by comparison of the handwriting of the signature with the signature of another deed which is produced and received in evidence as an ancient document, but the handwriting of which is not otherwise proved.

EJECTMENT for the east half of lot No. 23, in 2nd Con-
sion of Woodhouse.

Plaintiffs claimed title under a conveyance from George Robertson Edwards, James Montgomery, and Edward Thompson.

The defendant Erwin alone appeared and defended for the whole of the land claimed, and, besides denying plaintiffs' title, claimed title in himself by length of possession.

At the trial, before Morrison, J., without a jury, plaintiffs put in evidence a lease of the land in question, dated 1st September, 1864, from George Robertson Edwards, and the plaintiffs, James Montgomery and Edward Thompson, as trustees of Elizabeth Lucy Ronalds, widow, and the issue of her marriage with Henry Ronalds, deceased, to defendant Bennett. The lease was for seven years, at a given rent, and subject to certain covenants, upon Bennett's part, for building a barn on the demised premises and for clearing the land and farming in a husband-like manner, planting an orchard, payment of rent, not to assign or sub-let without leave, to surrender the premises in good repair, and other covenants usual in a strict farming lease.

It appeared in evidence that in the year 1847, Thomas Erwin, father of defendant Erwin, had entered upon the lot (under what title, or whether or not under any title did not appear), and that he continued in possession until his death in 1858; that his widow, the now defendant, Mary Bennett, continued in possession with her children, the eldest of whom was defendant Erwin; that after the expiration of two or three years from Thomas Erwin's death, his widow married defendant, Henry Bennett, who from the time of his marriage resided upon the land, and managed the place apparently as his own and for his own benefit; defendant Erwin working out at different places, but when out of employment living with his mother, Bennett's wife, upon the land in question. In August, 1863, Bennett recognised the title of the trustees of the Ronald's estate, and paid to their agent some rent for the place, but for what period did not appear: however, on 1st September, 1864, he accepted the lease of that date and executed it, and thereafter paid rent thereunder until in

the month of August, 1868, either for default in payment of rent or in the performance of the other covenants contained in the lease, upon the part of Bennett to be performed, his lessors Edwards, Thompson, and Montgomery, commenced an action of ejectment against him, to which Bennett failed to appear, and judgment was entered against him for default of appearance, whereupon a writ of *hab. fac. pos.* was issued on 22nd July, 1869, which was executed on the 24th July, 1869, by possession being given by the sheriff to one Davis, who lived on the other half of the lot, as agent for and on behalf of plaintiffs in that action. Davis, on receiving possession, every thing having been taken out of the house, locked and nailed it up, and the writ of *hab. fac. pos.* was returned and filed in Court with the return thereon made, that thereunder the sheriff had given possession, as he was commanded, to the then plaintiffs. Within three or four days, defendants Mary Bennett and her son James Erwin were back in possession, though how they got into possession did not appear, and this action was commenced on the 18th day of January, 1870.

It also appeared that both before and after the commencement of the action of ejectment, defendant James Erwin had applied to certain sub-agents of the general agent, in this country, of the trustees of the Ronalds' estate, who lived in England, to get a lease executed by the trustees to him in the place of Bennett. One of these sub-agents, who was attorney for the plaintiffs in the action of ejectment, agreed with him to give him the lease, but that arrangement fell through because the general or chief agent would not agree to it.

Plaintiffs further gave the following evidence of title: 1st. Letters Patent for the land in question, with other lands, dated 20th November, 1798, to Louvigny DeMontigny. 2nd. Deeds of lease and release, dated 5th of April, 1820, by way of marriage settlement, upon occasion of the marriage of Elizabeth Lucy Robertson with Henry Ronalds, whereby, after reciting that William Robertson, the father of Elizabeth Lucy Robertson being possessed of

a very considerable personal estate, consisting of consols and other stocks and funds, mentioning them, and being seised of divers lands and tenements in divers townships in Upper Canada, mentioning the townships, including Woodhouse, but not otherwise defining the lands, and also of land in Detroit, in the U. S. of America, made his will bearing date the 2nd day of December, A.D. 1806, whereby he devised all of the said personal estate, and all of his said lands, to the said Elizabeth Lucy Robertson, who was said to be his only surviving child, heiress, and devisee; and, after reciting the death of the said William Robertson, the proof of his will and certain proceedings thereunder in England, the said Elizabeth Lucy Ronalds conveyed and transferred all the said personal estate, and all the real estate whereof the said William Robertson died possessed and seised, and so devised unto Peter Laurie, the Rev. Thomas Edwards, James Montgomery, and Thomas B. Rowe, as trustees, their heirs and assigns, upon certain trusts therein declared, being the trusts of the marriage settlement of the said Elizabeth Lucy Robertson with Henry Ronalds. The deed contained a provision for the appointment of new trustees in the place of trustees, or a trustee, dying, refusing to act, or becoming incapable, &c.

3rd. A deed of bargain and sale, dated 13th October, 1804, whereby Louvigny Montigny, the grantee of the Crown, conveyed the lands mentioned in the Letters Patent to him, including the lot in question, unto William Robertson, therein described, of Queenstown, in the County of Lincoln, District of Niagara, and Province of Canada, merchant, and to his heirs and assigns in fee simple.

4th. A deed, endorsed on the last mentioned deed, and dated the 1st day of October, A. D. 1823, whereby William Robertson, therein described as "the within named William Robertson, now of Canborough, in the district of Niagara, of Upper Canada, merchant, in consideration of five shillings provincial currency, to him in hand paid by the Reverend Thomas Edwards, James Montgomery, and Thomas Bary Rowe (describing them as they are described in the deeds of

lease and release of 5th and 6th April, 1820), did grant, bargain, sell and release to the said Thomas Edwards, James Montgomery, and Thomas Berry Rowe," *all the within mentioned lands* and premises, with their appurtenances, and all the estate, &c., &c., of him. the said William Robertson, in the same, to have and to hold to the said Thomas Edwards, James Montgomery, and Thomas Berry Rowe, their heirs and assigns forever, "upon certain trusts declared and contained in a certain indenture of release, bearing date the 6th day of April, 1820, and made between Elizabeth Lucy Ronalds, then Elizabeth Lucy Robertson, and therein described as only child and heiress at law, and general devisee and legatee under the will of William Robertson, theretofore of Upper Canada, but afterwards of Thames Street, in the City of London, Esquire, deceased, of the first part, and the other parties to the deeds of lease and release of 5th and 6th April, 1820, (describing them precisely as therein described), being the settlement made previously to and in contemplation of the marriage of the said Henry Ronalds with the said Elizabeth Lucy, his wife." This deed of bargain and sale, and the deed endorsed thereon, were registered together on the 15th October, 1823, the former as number 1310, and the latter as number 1311. 5th. An indenture, bearing date the 1st April, 1840, whereby, after reciting, among other things, the [death of Peter Laurie, and the appointment in due form of John Ronalds as a trustee in his stead, and that the trustee James Montgomery had become a person of unsound mind, and the appointment in due form of Charles Field in his stead, the surviving trustees, Edwards and Rowe, together with one Edmund Ronalds, who by order of the Lord High Chancellor, in virtue of 11 Geo. IV. and 1 Wm. IV. ch. 60, concurred to convey for the trustee, James Montgomery, found to be a person of unsound mind, conveyed all the trust estates to the new trustees, namely, Edwards, Rowe, Field, and John Ronalds, their heirs and assigns, upon the trusts of the marriage settlement. 6th. A deed, dated 24th February,

1842, endorsed upon the deed of 1st April, 1840, whereby, among other things, George Robertson Edwards was appointed trustee in the place of Thomas Edwards, and the trust estate was conveyed by the old trustees to the new trustees, thenceforth being Thomas Berry Rowe, Charles Field, John Ronalds, and George Robertson Edwards, their heirs and assigns. 7th. A deed, dated 11th October, 1855, made "Between Elizabeth Lucy Ronalds, widow, a person of unsound mind, by James Montgomery, of, &c., the committee of the estate of the said Elizabeth Lucy Ronalds, of the first part, George Robertson Edwards, of the second part, James Montgomery and Edward Thompson, of the third part, and Henry Edwards Brown, of the fourth part, whereby, after reciting, among other things, the deeds of lease and release of 5th and 6th April, 1820, and that by divers intermediate appointments and conveyances, and ultimately by deed of 24th February, 1842, the trust estates became vested in Thomas Berry Rowe, Charles Field, John Ronalds, and George Robertson Edwards, the death of Henry Ronalds, leaving Elizabeth Lucy Ronalds, his widow; him surviving; that by an inquisition taken under a writ *de lunatico inquirendo*, upon the 15th day of May, 1851, the said Elizabeth Lucy Ronalds was found to be a person of unsound mind, and that the Master on proceedings in lunacy, in England, had reported that James Montgomery was a proper person to be made committee of her estate, and that he was appointed and confirmed as such committee by an order in Chancery made on 17th December, 1851; and, after reciting further the death of John Ronalds, on 7th March, 1850, and also the deaths of Thomas Barry Rowe and Charles Field, leaving George Robertson Edwards sole trustee of the trust estates; also an order of the Lords Justices in Appeal in Chancery, made the 27th day of April, 1855, in the matter of the lunacy of Elizabeth Lucy Ronalds, and in the matter of the Trustee Act of 1850, the Trustee Extension Act of 1852, whereby it was ordered that James Montgomery, her committee,

should, in the place and on behalf of Elizabeth Lucy Ronalds, exercise the power of appointment of new trustees, vested in her by the settlement of 1820, by appointing himself and Edward Thompson as trustees of the said indenture of settlement, and that the trust estates should be conveyed to the said trustees, the trust estates were conveyed to Brown as releasee, to the use of George Robertson Edwards, James Montgomery, and Edward Thompson, their heirs and assigns, as trustees thenceforth of the said trust estates. 8th. A deed of 28th July, 1865, made "Between Elizabeth Lucy Ronalds, of &c., widow, a person of unsound mind, so found by inquisition, acting by James Montgomery, of &c., the committee of her estate, of the first part, David Aitcheson, of &c., of the second part, George Robertson Edwards, James Montgomery, and Edward Thompson, of the third part, and the said James Montgomery, Edward Thompson, and David Aitcheson, of the fourth part, whereby, after reciting to the effect recited in the deed of 11th October, 1855, and, further, an order in the lunacy, made on 30th June, 1865, authorizing the committee, James Montgomery, to appoint David Aitcheson, a trustee in the place and stead of George Robertson Edwards, the said David Aitcheson was so appointed such trustee, and the trust estates were conveyed to the said James Montgomery, Edward Thompson, and David Aitcheson, their heirs and assigns, as such trustees.

It was objected, for the defendant, at the trial, that the title under the judgment recovered in ejectment was not sufficient in itself to enable the plaintiffs to recover in this action; that it only shewed that the plaintiffs therein were entitled to possession at the date of the issue of the writ, and not at any time previous; that such evidence was not evidence of title, or of a continuing right to possession, or of any title to eject now; and that the plaintiffs had failed to prove a paper title, for the following reasons: 1st. That the ancient deeds were not shewn to come from the proper custody to entitle the plaintiffs to say they proved themselves. 2nd. That in the deeds of lease and release, of

April, 1820, the title of the settlor, Elizabeth Lucy Robertson, was recited to be as heiress-at-law and devisee of her father, William Robertson, and that neither the heirship nor a will had been proved; that it was evident that the William Robertson who executed the deed of October 1st, 1823, could not be the William Robertson mentioned in the deed of 13th October, 1804; that there was no evidence that he was the same person, and that the presumption was that he was not. 3rd. That no authority was shewn enabling James Montgomery, recited in the deed of 1840, to be committee of the estate of James Montgomery, then trustee, therein recited to be of unsound mind, to convey any estate situate in Canada, vested in the said James Montgomery, the trustee; that if the authority was derived from an English Statute, it was not shewn, and if the authority was derived from a Statute, it should be proved; that there was no proof of the order in Chancery recited in this deed. 4th. That no proof at all was given of the deed of 24th February, 1842, under which George Robertson Edwards took, and therefore that the title, so far as derived from him, failed. 5th. That no sufficient evidence of the execution of the deeds of 11th October, 1855, or of 28th July, 1865, was given, and so that the plaintiffs had not proved title in themselves.

A verdict was rendered for the defendant by consent, leave being reserved to set aside the same, and to enter a verdict for the plaintiffs, if the Court, who were to be at liberty to draw all inferences as a jury, should be of opinion that upon the evidence, notwithstanding the above objections, it should be entered in favour of the plaintiffs, or any of them.

In Michaelmas Term last, *C. S. Patterson* obtained a rule nisi accordingly.

T. Moss shewed cause, citing *Doe v. Huddart*, 2 C. M. & R. 316; *Doe v. Harlon*, 12 A. & E. 40; *Doe Morse v. Williams*, C. & M. 615; *Nowlan v. Gibson*, 12 Ir. L. R. 5.

C. S. Patterson, contra, cited *Re Schofield*, 24 L. T. 322;

Thompson v. Hall, 31 U. C. 367; *Edwards v. Bennett*, 5 Pr. Rs. 161; *Asher v. Whitlock*, L. R. 1 Q. B. 1; *Doe Strode v. Seaton*, 2 C. M. & R. 728; *Doe Radenhurst v. MacLean*, 6 U. C. 350; *Doe Boulton v. Walker*, 8 U. C. 571; *Drake v. North*, 14 U. C. 476; *Perlington v. Brownlee*, 28 U. C. 189; *Doe dem Bord v. Burton*, 16 Q. B. 807; *Accidental Death Co. v. McKenzie*, 5 L. T. N. S. 20.

GWYNNE, J., delivered the judgment of the Court.

As to the first objection to the chain of paper title, namely, that the ancient deeds are not shewn to come from the proper custody. The evidence upon the point is that of Mr. Becher, who says that in the month of July, 1870, James Montgomery, both as committee of the estate of Elizabeth Lucy Ronalds and as a trustee, and George Robertson Edwards, Edward Thompson, and Henry Edwards Brown, acknowledged in his presence, as a witness, for the purpose of enabling him to prove the deed of 11th October, 1855, that they had respectively executed that deed, and that their respective signatures set thereto were in their respective handwriting. He also says that he procured them several times to sign their names in his presence, for the purpose of enabling him to judge himself of their handwriting, and that from his knowledge of their handwriting so acquired, he has no hesitation in saying that the signatures to the deed are genuine and in the handwriting of the said respective parties. He gives the same identical testimony as to the execution of the deed of 28th July, 1865, by James Montgomery, George Robertson Edwards, and Edward Thompson, and he says that he received all the deeds produced at the trial, including the ancient deeds, (except the deeds of 1804 and 1823, which came into possession of Mr. McLean, deceased, agent of the trustees) from Messrs. Thompson & Dobenham, a firm of solicitors in London, of which firm Thompson, the trustee, is a member, and who are solicitors of the trustees. By perusing the deed of 11th October, 1855, which appoints Thompson to be a trustee, we find that at that time and

previously thereto, Messrs. Thompson & Dobenham were solicitors of the trustees. The deeds then are proved to come from the custody of a firm of solicitors of persons claiming to be trustees, one of which firm himself claims to be one of such trustees, in virtue of a series of deeds executed at different times, commencing with the deeds of lease and release of the 5th and 6th April, 1820, and which deeds, assuming them to have been well executed, constitute the plaintiffs as the sole present trustees, and them and their solicitors the only proper depositary for the deeds. Now the object of giving any evidence of the custody from which a deed thirty years old comes, is to afford to the Judge reasonable assurance of its authenticity: *Doe Jacobs v. Phillips* (8 Q. B. 158). Patteson, J., in that case said, "It would be most inconvenient if, in cases where a deed is produced by the parties attorney, enquiries were to be made how or where he got it." In *Doe Shrewsbury v. Keeling* (11 Q. B. 884), Lord Denman says: "Most of the reported cases are decisions in favour of receiving documents on the ground that they have come from proper custody, and the Courts ought to be liberal in that respect." And in *Rees v. Walters* (3 M. & W. 531), Parke, B., said, "I rather think it is for the Judge to say whether a document is produced from the proper custody or not, and we cannot interfere unless we think it wrong." And in *Croughton v. Blake* (12 M. & W. 208), following *The Bishop of Meath v. Marquis of Winchester* in *Dom. Proc.* (3 Bing. N. C. 304), it is laid down "that all that is necessary is, that the document should come from the place in which it might reasonably be expected to be found." Now the most reasonable and natural place to expect to find these ancient deeds, is in the custody of the persons who claim to be trustees of the estate in virtue of divers mesne conveyances traced down from the original settlement. If the title be well conveyed by these mesne conveyances, the present trustees, from whose custody the ancient deeds came, are the proper persons to have the custody of them; but any defect, if there be any in the mesne conveyances,

cannot affect the question of their custody of the deeds being the reasonable custody while they claim to be the trustees, and that claim is not disputed by any person asserting a superior title. Moreover, the trustee from whose possession the deed came, is one of the trustees who, as we find, asserted title as trustees to the land in question here, and recovered in ejectment against the defendant Bennett, and who executed the lease to him in September, 1864. There can be no doubt as to the sufficiency of the evidence of the custody from which the ancient deeds produced in this case come.

Now as to the second objection. The deed of the 1st of October, 1823, is endorsed upon the deed of October 4th, 1804, and the party, William Robertson, executing the former deed, is recited to be the "within named," that is, the William Robertson mentioned as grantee in the deed of 1804. From these facts a presumption arises, to the contrary of which there is no evidence, that the person executing the deed of 1823 had then the possession of the deed of 1804; and that, having such possession, he was the person entitled to have it, and so that he was, as he declared himself to be, the grantee of the deed of 1804. The objection seems to be based upon the assumption of its being established beyond question that the grantee of the deed of 1804 was the father of Elizabeth Lucy Robertson, the settlor in the deed of April, 1820; but it is nowhere said that her father was seised of the lands mentioned in the deed of 1804. But whether the grantee of that deed was or not the father of Elizabeth Lucy Robertson, matters not; for if he was, then the recital of his death in the deed of April, 1820, and that his estates had passed, either by inheritance or devise, to Elizabeth Lucy Robertson, his daughter, was untrue, and the consequence would be, that no estate in the lands mentioned in the deed of 1804, or in any other lands whereof Elizabeth Lucy's father was seised, passed under the deeds of April, 1820, to the persons named as trustees therein; the lands still remained vested in the father; and it was competent for him, not-

withstanding the untrue recitals in the marriage settlement, to convey any lands of which he was seised to the same persons as had been named in the ineffectual marriage settlement, and upon the same trusts as were therein declared, referring to the settlement for the purposes only of describing the persons to take as grantees and of defining the trust upon which they should take. But assuming (and in view of the matters recited in the deeds of 1820, this appears to be the most natural presumption), that the grantor in the deed of October, 1823, being also the grantor of the deed of October, 1804, was not the father of Elizabeth Lucy Robertson, then, in like manner, it was quite competent for him to grant, as he did by the deed of 1823, lands of which he was seised, to the persons named as trustees in the marriage settlement of April, 1820, and upon the trusts declared therein, so that, in the one case, *notwithstanding* the recitals contained in the marriage settlement, and in the other case *quite consistently with the truth of those recitals*, the persons who were named as trustees in the settlement, took the lands mentioned in the deed of 1804, under and only under the deed of October, 1823, but subject to the trusts of the marriage settlement, from the grantee of the patentee of the Crown for the lands in question; so that, whether Elizabeth Lucy Robertson was or not her father's heiress-at-law, or devisee under his will, forms no part of the evidence of the title to the land in respect of which the action is brought.

Then as to the third objection, the deed of 1840 recites that the authority under which Edward Ronalds, as committee of James Montgomery, a trustee of unsound mind, upon his behalf executes the deed, is derived from certain orders of the High Court of Chancery, in England, in the matter of the Lunacy and under the provisions of the Imperial Trustee Act, 11 Geo. IV. & 1 Wm. IV. ch. 60, and we are bound to take notice that this Statute does expressly enable lands held in trust by a person of unsound mind, to be so conveyed, although the lands be situate in this Province.

As to the fifth objection above noted, I am of opinion that the evidence of Mr. Becher, as to the execution of the deeds of October, 1855, and July, 1865, was undoubtedly evidence as to the proper execution of those deeds at their respective dates, which must have been submitted to a jury if the case had been tried by a jury, and that, in the absence of any contrary evidence, it is abundantly sufficient to warrant the finding that those deeds were duly executed upon the respective days upon which they purport to have been executed. No objection was taken as to those deeds except as to the alleged insufficiency of proof of their execution. No objection was taken as to the want of proof of the orders recited in the deeds as having been made by the High Court of Chancery in England in the matter of the lunacy of Elizabeth Lucy Ronalds, and under the Trustee Acts therein recited. In a case of this kind, the defendant must be held strictly to the terms of the objections which were made on his behalf.

There remains, however, the objection that there was no proof offered of the making of the orders in Chancery, recited in the deed of 1840, nor of the execution of the deed of 1842. With respect to these objections, sufficient does appear to shew that they are wholly devoid of merit, and appear to be such as might have been met by a notice given under the 17th section of the Ejectment Act; and as to the deed of 1842, it was clearly open to proof by comparison of handwriting with the deed of 1840, if a witness had been called for that purpose, and it was contended, on behalf of the plaintiffs, that it was competent for the Judge himself, trying the case without a jury, to compare the signatures of the parties to the deed of 1842 with those of the same parties to the deed of 1840, treating the latter as sufficiently proved for that purpose. Finding, as we do, the deed of 1842 endorsed upon that of 1840, which latter we must take to be an authentic instrument, and so the one inseparably connected with the other, I think, upon the authority of *Cobbett v. Kilminster* (4 F. & F. 490), *Cresswell v. Jack-*

son (2 F. & F. 24), *Brooke v. Tichbourne* (5 Ex. 929), and *Doe Perry v. Newton* (5 A. & E. 518), that a Judge trying the case without a jury might, with perfect propriety, satisfy his mind by comparison of the signatures to both deeds, of the authenticity of the latter as *primæ facie* evidence thereof. In *Doe Perry v. Newton* (*sup.*), which was before the Statute, Coleridge, J., says: "It is true that the objection now taken applies in some degree to the proof of ancient writings by comparison, which is constantly allowed, but that is an excepted case, the documents not being capable of proof in the usual way, and the danger of improper selection is less than in the case of modern writings." The endorsement of the deed of 1842 upon the deed of 1840, coupled with the fact that the four grantees of the deed of 1840 are the grantors of the deed of 1842, and that three of them, with another, in lieu of the fourth, are again grantees through the intervention of a releasee to uses, and that the sole object of the deed is to transfer the estate to the new trustee jointly with the others, so that, their estate being intended to be joint, all may take by unity of estate, affords strong evidence of the genuineness of the deed of 1842, and I can see no danger in a Judge, as a jury, forming his opinion of its genuineness, without further evidence, by his own comparison of the signatures. Now, if the deed of 1842 should be accepted as proved, then, there having been no objection taken to the subsequent deeds except as to the proof of their execution, for which purpose I think the evidence was sufficient, the title of the plaintiffs Montgomery and Thompson would be clearly established to entitle them to recover to the extent of all except the undivided part assumed not to be proved to have been conveyed out of the original trustee, Montgomery, by reason of want of proof of the orders recited in the deed of 1840. However, yielding the fullest effect to both of these objections, and consequently ignoring the deeds of 1855 and 1865, I am still of opinion that the plaintiffs are entitled to recover. It sufficiently appears by the

deed of February, 1840, and the deeds prior thereto, that the legal estate in the land sought to be recovered in this action was, in 1840, vested in certain persons, as trustees, upon the trusts declared in the deeds of 1820; that is, as trustees of the Ronalds estate; and the contention of the defendant involved in the objection taken on his behalf is, that there is no evidence of the title having ever passed out of the trustees in whom it was vested at the time of the execution of the deed of 1840; but, from this fact, that in 1840 the legal estate is shewn to have been in certain persons upon certain trusts, the presumption arises that it continued to remain *in them* until the contrary shall be established.

Now, by the evidence of David Tisdale, who has been for many years a sub-agent of the trustees of the Ronalds estate, it appears that in August, 1863, he went with Mr. McLean, now deceased, who was then and had been, for some years previously, general agent of the trustees, to the lot in question, and that he there found the defendant, Henry Bennett, in possession; that he then acknowledged himself to Mr. Tisdale to be in possession as tenant of the trustees, and that he then accounted to witness for some rent, although how much does not appear; that on the 1st September, 1864, he signed and accepted a lease of the lot executed to him by George Robertson Edwards, James Montgomery, and Edward Thompson, therein described as trustees of Elizabeth Lucy Ronalds, by A. D. McLean, their attorney, who had a power of attorney, which lease is witnessed by Mr. Tisdale, and thereafter under that lease, Bennett paid rent to Tisdale, as agent of the trustees. For some default in the fulfilment of the terms of that lease, Mr. Tisdale, as attorney of the lessors, the trustees named in the lease, commenced an action of ejectment against Bennett on the 22nd August, 1868. By the evidence of James M. Tisdale, who served the writ of ejectment, it appears that, before or at the time of the service of the writ, the defendant, James Erwin, in conversation with witness, stated that he, the defendant Erwin, wanted

to get a lease from the parties who had leased to Bennett, of which lease he was aware, and that it was the same kind of lease that he wanted to get, and that he had gone to Simcoe about getting the lease, and that he was annoyed at not having got it; that he had several conversations to this effect with witness. By the evidence of Mr. David Tisdale it appeared that the defendant Erwin had several times applied to him, as agent of the trustees of the estate, to get a lease of the land from the trustees; no names were mentioned but the trustees of the Ronalds estate: that Mr. Tisdale arranged with the defendant to give him such a lease as he wished, but the arrangement fell through, because the general agent of the trustees would not agree to it. The action of ejectment, which was brought against Bennett, proceeded to judgment for default of appearance on September 8th, 1868, upon which a writ of possession issued on 22nd July, 1869, which was executed on 24th July, 1869, by the sheriff removing Bennett's wife and her family, including the defendant James Erwin, and delivering possession to one Davis, also a tenant of the other half of the same lot, under the trustees of the Ronalds estate, and whom Mr. David Tisdale, the attorney of the plaintiffs in that action, and sub-agent of the trustees, had appointed to receive possession upon behalf of Mr. Tisdale's clients. Davis accordingly did receive possession, and he nailed up the doors on the inside and the windows on the outside, and the sheriff returned the writ of possession as duly executed. Other witnesses give evidence to the effect that while Bennett was on the land he controlled, managed, and, as one witness expressed it, "bossed" the place; and that James Erwin was accustomed to work out through the country, and when out of employment that he used to live with his mother, Mrs. Bennett, and no witness ever heard of the defendant Erwin having ever had any charge of the place.

Now the proper inference to draw from the above evidence is, that Bennett was the person in possession when Mr. Tisdale, in 1863, received from him the recog-

nition of the persons, his clients, who claimed then to be trustees of the Ronalds estate, and that from the time that he acknowledged the trustees of the estate, or at least from the time that he executed and accepted the lease from them, his possession was the possession of the persons who, as trustees, executed the lease; and so that until the execution of the writ of possession, those lessors were in actual and peaceable possession by their tenant Bennett, and that after the execution of the writ of possession the persons for whom Mr. Tisdale was then acting, as the trustees of the Ronalds estate, were in possession through Davis, whom Mr. Tisdale had appointed to receive the possession on behalf of his clients, which possession so obtained is presumptive evidence of seisin in fee in them.

Now the proper inference to draw from the evidence is, that shortly after the delivery of the possession by the sheriff to Davis, the defendants Mary Bennett and James Erwin broke open the house which had been nailed up by Davis, and so in re-entering committed a trespass upon the peaceable and actual possession which Mr. Tisdale's clients, through Davis, then held, and which possession the defendants knew to be under claim of title. Thus the defendants so entering, unless they can shew title, have been guilty of a wrongful entry upon, and a forcible eviction of the plaintiffs, who appear to have been the parties represented by Davis. They have failed to shew any title, as there had not been acquired a twenty years' possession by Thomas Erwin and his heirs at the time that the trustees of the Ronalds estate, named in the lease, two of whom are plaintiffs in the present action, had re-entered and enjoyed the possession through their tenant Bennett. The question is not one of estoppel, but of a forcible entry upon and eviction of persons claiming to be entitled by title derived from the trustees of the Ronalds estate, in whom, in 1840, the legal estate is shewn to have been; and who, although they may have failed to afford strict evidence of title derived from these trustees, nevertheless have shewn themselves to have had such an actual and peaceable possession

as is presumptive evidence of seisin in fee, and sufficient to entitle them to recover, without further proof, against the persons guilty of such forcible eviction, unless they can prove title, which they have failed to do. It is the case of *Doe v. Dyeball* (1 Mood. & Mal. 346), which is recognised in all subsequent cases. I think therefore that the record of the verdict should be amended, and verdict and judgment entered for the plaintiffs.

HAGARTY, C. J.—I agree in the result arrived at by my brother Gwynne, that the plaintiffs are entitled to judgment. I so agree, without reference to any rule of general application as to comparison of handwriting.

GALT, J.—I also agree in the above judgment; but express no opinion on the question of comparison of handwriting.

Judgment accordingly.

MEMORANDA.

During this term the following gentlemen were called to the Bar:

THOMAS MATTHIE BROOKE, FRANCIS HENRY CHRYSLER, THOMAS JAFFRAY ROBERTSON, HENRY SANDFIELD McDONALD, ANDREW GREENLEES, JAMES ALBERT PROCTOR, JOHN MARTIN, JAMES ALEXANDER McDOWALL, ANDREW LEES, ROBERT A. NELLES, FREDERICK WILLIAM JOHNSON, ALFRED PASSMORE POUSSETTE, ROGER H. C. GREENE, G. W. HERBERT BALL, FRANCIS C. CLEMOW, JOHN S. WILSON, LINDSAY HALL.

IN THE COURT OF ERROR AND APPEAL.

MASON (ASSIGNEE) *Appellant*, v. HAMILTON, *Respondent*.

Insolvency—32-33 Vic. ch. 16, sec. 81—Construction.

The judgment in this case, as to the construction of section 81 of the Insolvent Act of 1869 (32-33 Vic. ch. 16 sec. 81), *ante* p. 190, reversed in Appeal.

Appeal from the judgment in this case, *ante* p. 190.

The grounds of appeal were, 1. Because the true construction of the eighty-first section of the Insolvent Act was in accordance with the appellant's contention.

2. Because the policy of the Act was to remove, as far as just, all preferences among creditors in the distribution of assets of insolvents. This was apparent from the way in which creditors by execution were dealt with in section fifty-nine.

2. A landlord with a long arrear had no special claim in reason or justice to preference over other creditors, or that a strained construction should be put on the Act for his benefit; on the contrary, his want of diligence was against him.

4. The language of the eighty-first and tenth sections of the Act was applicable to the case of a landlord who was in possession by virtue of a distress before the making of an assignment. He was a pledgee. He had a lien.

5. The Statute of Anne, referred to in the judgment, did not make use of the word lien, nor was the right given by the statute to landlords a lien in any sense of the word, as recognised in Courts either of law or equity, nor was there any analogy between that statute and the Insolvent Act.

6. The construction put upon the Act by the judgment was a strained and forced construction, nor did it advance or promote the remedial effect of the Act, but the reverse.

Argued 7th June, 1872, before DRAPER, C. J., of Appeal, SPRAGGE, C., HAGARTY, C. J., MORRISON, J., MOWAT, V. C., GALT, J., STRONG, V. C.

7. If there was any want of harmony between the language of the eighty-first and tenth sections of the Act, as suggested in judgment, it was to be reconciled by holding that, unless by seizure prior to insolvency, the landlord lost all preference whatever.

8. Because, upon the law and principles of the case, the judgment of the Court below should have been for the appellant.

James McLennan, for the appeal. The 81st section of the Insolvent Act of 1869 defines the right of the landlord. The judgment of the Court below proceeds upon the ground that the preferential lien spoken of is the same as the right of privilege given over an execution creditor by the Statute of Anne; but that argument cannot prevail.

The policy of our law is to distribute ratably the assets of parties unable to pay their debts in full. The Act of 1864 adopted the policy of the English Acts, protecting liens in existence at the time of assignment.

Under that Act the landlord might have distrained even on the assignee.

By the Act of 1865 the right of all holders of liens was interfered with in favor of general creditors; and the landlord was restricted to one year's rent.

In 1869 the Legislature went further, sweeping away the rights of execution creditors to the extent of impounding money levied on his execution, when not paid over.

The landlord has no lien, properly so called, until he has distrained. [STRONG, V.C.—By levying distress, it is taking the first step towards making the lien absolute.] Yes, and his lien continues until sale; and it is plain that that is what the Act restricts. The Act says plainly, that when the assignee comes in, and finds an execution creditor in possession, the latter must give up his lien *in toto*; but if he finds the landlord in possession, he has also to give way, except to the extent of a year's arrears: see *Woodfall* 380. *Hammond v. Barclay*, 2 East 235, defines lien.

M. C. Cameron, Q. C., contra. In Upper Canada a landlord has no preferential lien.

The language of the Act does not take away the right of the landlord, and in the absence of such language it cannot be taken away.

DRAPER, C. J., OF APPEAL.—The question in this case is the construction of the 81st section of the Act of the Dominion, 32-33 Vic. ch. 16, in the following words: "The preferential lien of the landlord for rent in the Provinces of Ontario, New Brunswick, or Nova Scotia, is restricted to the arrears of rent due during the period of one year last previous to the execution of a deed of assignment or issue of a writ of attachment under this Act, as the case may be, and from thence so long as the assignee shall retain the premises leased."

The doubt arises on the words *preferential lien*. If the latter word is construed according to our law, it means a right to keep possession of the goods of another until a claim or claims of the holder of the goods against that other are satisfied. It therefore implies an actual possession; not a mere right to take possession, nor yet a right to all the goods in order to satisfy such claims. It is not easy to understand such a term in relation to a landlord to whom rent for one or more years is due. Until distress levied he has no actual right in the tenant's goods; he must distrain to acquire one; and having distrained (unless there be a replevin within five days, or payment) he acquires the right to sell. And the word "preferential," however suitable to the case provided for by the 3rd section of the 29th Vic. ch. 18, or to the case provided for in 27 & 28 Vic. ch. 17, sec. 8, sub-sec. 4, is not accurately employed in reference to the landlord's remedy for overdue rent, by distress.

These words being in their ordinary and legal acceptance inapplicable to the apparent object of the enactment, we must endeavour to ascertain the sense in which they have been used, from the statute itself, and especially from the section into which they are introduced.

It is sufficiently obvious that the Legislature contemplated some restriction of the rights which our law gives to the landlord in ordinary cases ; in other words, to impose a limit on his right to recover his rent by distress. The Real Property Act (Con. Stat. U. C. ch. 88, sec. 19) enacts that no arrears of rent shall be recovered by any distress, action or suit, but within six years after the same shall have become due. The Statute 8th Anne, referred to by my brother Gwynne, in the Court below, gave to the landlord a right to demand one year's rent from the party at whose suit execution is issued against the tenant's goods, before the removal thereof. This was for the protection and in aid of the landlord, who could not distrain on goods *in custodia legis* ; but this statute contains no such term as " preferential lien," which it is suggested may have found its way into our Insolvent Act from the comments of Chief Baron Gilbert on its provisions ; and I confess my inability to discover any analogy between an Act which gives a new right to a landlord, namely, to obtain satisfaction for his rent, by a sort of embargo upon goods seized for the benefit of an execution creditor, and an enactment obviously intended to restrict the landlord's right to distrain for all overdue rent. What preference does the landlord really possess over an ordinary creditor, unless it be the right to distrain for six years' overdue rent, without either suit or judgment to recover it, upon any goods he can find on the demised premises, subject, of course, to certain well known exceptions. No doubt the term here is not properly applicable to this right, and the term " preferential claim," indicating a right to be paid in priority to other creditors, as used in the proviso to the 10th section of the Act of 1869, would more nearly, though still imperfectly, represent the landlord's right.

My strong impression, I must confess, at the close of the argument, and a long time afterwards, was in support of the judgment in the Court below. Having since had the benefit of a conference with my brother Judges I have carefully reconsidered the case, and I now think that the

true construction of the statute leads to a contrary result. My principal difficulty arose from the consideration that in this case the landlord had distrained for six years' rent before any proceedings in insolvency were taken. I doubted whether, although such proceedings immediately followed the distress, the landlord could be prevented from completing what he had begun, and what, as against the tenant, was warranted by law; but, on reflection, I think the language of this section of the Act wide enough to include the case of an inchoate distress; nor will this construction be a solitary instance of interference by the Act with the acquired right of a privileged, or rather preferential, creditor, in order to carry out, as far as can reasonably be done, the leading principle, that the creditors of an insolvent should equally participate (*pro rata*) in the proceeds of his estate.

I think, therefore, the judgment of the Court below should be entered for the plaintiff for one shilling damages and costs of suit, according to the agreement of the parties, in case this Court should be of opinion that the respondent could not maintain his distress for more than one year's rent.

SPRAGGE, C.—The effect of the assignment in insolvency is to vest all the property of the bankrupt in the assignee, and *primâ facie* for the general benefit of the creditors.

Goods taken in execution by the sheriff, and goods distrained upon, were at the moment of the assignment still the goods of the insolvent, and passed by the assignment to the assignee.

Any special claims exempting the assets of the insolvent from application to the payment of all creditors *pro rata*, must be found in the statute, or they do not exist at all.

I think the word "pledgee," at the close of section 10 of the Act of 1869, does not apply to goods seized under distress. The language of the section, and the language and provisions of section 60, besides, are against it, and the case of a landlord is specifically provided for by section 81.

The language of the English Bankruptcy Act is different from ours. They all fix the time at which the right of the landlord shall be affected at the date of the committing of an act of bankruptcy. The Act of 1869 uses a different phrase, "the commencement of the bankruptcy," (section 34), but it has the same meaning, section 11. The Imperial Act 6 Geo. IV. ch. 16, 12 & 13 Vic. ch. 106, and 32 & 33 Vic. ch. 71, all deal with the case of distress levied; and enact, in effect, that, if levied after act of bankruptcy committed, the landlord's remedy by distress shall be limited to one year's arrears. The Acts deal with that case only, leaving the rights of the landlord unaffected in cases where distress is levied before act of bankruptcy committed.

Our Acts differ essentially. They do not deal with the case of distress levied at all, but deal generally with that for the receiving of which the distress is levied, *i. e.*, the rent due to the landlord. They call it a "preferential lien." The use of the term may be accounted for by the circumstance of the Act being applicable to several Provinces varying in their laws and legal terms. The Court at any rate must put a construction upon it, and taking it in the connection in which it is used, its meaning appears to me sufficiently plain. In *Hammond v. Barclay* (2 East 235) Mr. Justice Grose, in delivering the judgment of the Court, defined a lien to be "a right in one man to retain that which is in his possession, belonging to another, till certain demands of him, the person in possession, are satisfied." The prefix "preferential" is a word hardly necessary, perhaps, to describe the quality of the lien; but it is appropriate as descriptive of its quality, in that it is to be preferred to the general claim of others in respect of the same thing, *viz.*, the goods of the debtor. Taking Mr. Justice Grose's definition in its terms, it applies strictly to the case of a landlord who has already made a distress, inasmuch as until distress made the possession is not in the landlord, but in the tenant. To apply this to section 81 of the Act of 1869, the preferential lien of the landlord for rent,—that lien arising upon distress for rent levied—

is restricted to the arrears for one year before assignment.

But, assuming that the words "preferential lien" have a wider signification, and mean the right to have possession by distress as well as the consummation of that right by the actual levying of a distress, still the latter, the more accurate technical meaning of the word, cannot be excluded. All that can be said is, that the term is wide enough to include both. Further, even if the primary signification of the term were the right to distrain, and to satisfy rent in arrear by distress, still section 81 does in terms apply. It is to be borne in mind that our statute says not a word about "distress for rent," the words used in the two earlier English Acts cited; or as to "distraining upon the goods and effects of the bankrupt," the words used in the Act of 1869. Our Act is silent upon that point. Then, what is the nature and effect of levying a distress. Is it anything more or less than a process by which the right of the landlord to have the goods of his tenant applied to the payment of his rent, is enforced? Call that right a preferential lien: nothing is more clear than that by enforcing a lien a party entitled to it does not forego it. As was said by Lord Wensleydale in *Hughes v. Lenny* (5 M. & W. 191) "he may maintain an action for the debt, retaining his lien notwithstanding." The lien on the goods remains still a "preferential lien;" not changed in its character by the fact of its being enforced by the ordinary and appropriate remedy.

It is true that the right of the landlord to distrain for arrears of rent not exceeding six years, is left untouched by the English Bankruptcy Acts where the distress is made before act of bankruptcy committed. The English Acts are so explicit that they leave no room for doubt as to their proper construction. Their policy, however, is not to save any rights of the landlord, but rather to interfere with the landlord's rights, where not put in force before a certain date, that date, too, being earlier, and in some cases much earlier, than would be the date

under our statute, if the judgment of the Court of Common Pleas is a correct interpretation of the law.

I feel, I confess, some difficulty in following the reasoning of my brother Gwynne, by whom the judgment of the Court below was delivered, in relation to the statute of Anne. That statute was an enabling statute in favor of the landlord to a limited extent. Without the aid of the statute he could not obtain payment of his rent. The argument is, that if a distress had been made and levied before the sheriff came in with an execution, "the Statute of Anne availed nothing; the distress levied prevailed over the execution;" and the conclusion drawn is, "so, upon the analogous principle, the distress levied before insolvency takes place, must prevail over the title of the assignee in insolvency." I venture to think it would be more correct to say that, where distress is levied before execution, the aid of the statute is not needed, and the landlord by his distress has the prior right which the execution does not override. The only principle in the case is that the prior is the better right; and it is quite independent of any statutory provision on the subject. The difference, and a very material one, is, that we have a statute which defines the rights of the parties; and the only question, in my judgment, is, what is the proper construction of the statute?

The judgment refers to the policy of the English Bankruptcy Acts, and speaks as if any other construction than that put upon our Acts by the judgment, would do great violence to the rights of the landlord. Whatever the policy of the English Bankruptcy Acts, and I see in them nothing peculiarly conservative of the rights of the landlord, there can be no question of the policy of our Insolvency Acts. Their policy is progressive in the direction of abolishing preferences in favor of any classes of creditors, as my brother Gwynne has himself shewn in his judgment; and, as to doing violence to the rights acquired by particular creditors, what stronger instance can be given than the setting aside, in favor of the general creditors, of the rights of a judgment creditor to money levied upon his execution?

It would be a strange anomaly for the statute to respect the right of a landlord, because acquired by a process which is issued by himself, and at the same time to disregard and set aside the right of a creditor acquired also by process, but issued by the Courts. So far as the policy of the law can be gathered from the provisions of the statute, no argument can be drawn in favor of the contention of the landlord.

In my view of the case it matters not whether we read the words "preferential lien" as meaning the right of the landlord attaching upon the goods, or to which the goods are subject, or the process by which the right is enforced. It seems to me an *argumentum ad absurdum* to say that the right to the process can continue to subsist, when the debt itself is abolished, or, as in this case, is restricted.

It is suggested that the Act deals only with proceedings in insolvency, and that section 81 only applies where the landlord has to make a claim in the course of the insolvency proceedings. I do not agree in this. The goods levied upon by the landlord were the goods of the insolvent, and continued to be his goods after distress, as well as before; and the property in them passed to the assignee, subject only to what the statute calls the "preferential lien" of the landlord. The distress had not the effect of keeping them outside the insolvency proceedings. They were, therefore, a something subject to be dealt with by the statute, and the question is, whether they are so dealt with. I have already given my reasons for thinking that they are.

As to section 81 only applying when the landlord has to make a claim in insolvency proceedings, that is just the question to be decided; and it comes again to the simple point, what is the proper construction of the 81st section of the Act?

The statute deals with the future, and provides for the rights of a debtor, of his landlord and of his general creditors; or, rather, adjusts the rights of the two latter in certain events which may happen. One is, that the debtor may get into arrears for rent, and that for several years'

at the same time being in debt to other creditors beyond his means of paying. These events give to the landlord a certain status, which the statute, having in view the fact of there being other creditors, styles a "preferential lien," and in so many words restricts it to the arrears of rent due for one previous year. Now, how are these plain words got over? By this only, that the landlord has taken means to establish and enforce his preferential lien, and has issued a process which the law allows him to do. But how is this an answer? If these means, and this process, had the effect of converting this preferential lien into something else, there might be something in it; but no such change is effected thereby; what was a preferential lien, remains a preferential lien still, with no change in its nature or character. Such being the case, I am quite unable to see how the landlord can be freed from the restriction which the statute so distinctly imposes upon him.

I say this, assuming that the words used in the statute may be read as not necessarily meaning a lien consummated by process. If it means not only the right to have possession, to detain, and to sell, but actual possession and detainer, the case is still stronger against the landlord; but in my opinion the latter is not necessary to the plaintiff's case. I think the plaintiff is entitled to judgment.

I should not have thought it necessary to go at such length as I have done into the case, but for the different conclusion arrived at by the learned Judges of the Court of Common Pleas, for whose opinion I entertain the greatest respect.

MORRISON, J., and STRONG, V. C., concurred.

HAGARTY, C. J., and GALT, J., adhered to the opinion expressed by the Court below.

MOWAT, V. C., was not present when judgment was delivered.

Per Curiam.—Appeal allowed.

IRWIN, *Respondent*, v. THE CORPORATION OF BRADFORD,
Appellants.

The judgment in this case, *ante* p. 18, affirmed in Appeal. DRAPER C. J., OF APPEAL, dissenting.

Appeal from the judgment in this case, *ante*, p. 18.

The grounds of appeal were :—

1. The road, in respect of which non-repair was alleged, was not a public road vested in the appellants within the meaning of sections 338 and 339 of the Municipal Institutions Act.

2. The road being situate in the County of Simcoe, and not in the County of York where the venue was laid, and the action being local and locality necessarily arising under the second plea, no recovery could be had on a verdict rendered in the County of York, and between the declaration and the evidence there was, in this respect, a fatal variance.

3. The rule *nisi* in the Court below should have been made absolute either to enter a nonsuit, pursuant to leave reserved at the trial, or to arrest the judgment.

Harrison, Q. C., for the appeal.

There are two grounds—1st, the road was not vested in defendants; 2ndly, whether vested or not, plaintiffs should have been nonsuited, as the road is to be presumed to be in the County of York (venue being laid there), while the evidence shews that it is in the County of Simcoe. There is no county mentioned in the body of the declaration as the locality of the road. No proclamation was ever issued by Government vesting the road in the County Council under the statute. In England parishes are liable, and they must shew some third person liable, to get rid of the liability to repair.

There was no order in Council.

So far as the statutes shew, the road is vested in Her Majesty. By-law 12 of the County Council was improper,

as the road never vested either by proclamation or order in Council. By-law 86 repeals by-law 12. This was subsequent to the incorporation of Bradford. By-law 86 enables municipalities to take possession of material, &c. It shews that the road was then vested in the County Council, and nothing has since been done to divest them of it: See *Morey v. Town of Newfane*, 8 Barbour 645; *Mower v. Leicester*, 9 Mass. 247; *Mersea Docks Case v. Gibbs*, L. R. 1 H. L. C. 93.

If there is liability under the statute, the plaintiff is bound to shew it. The municipality repaired for their own convenience. The fact that the Council have abandoned this road does not throw upon the defendants the liability to repair.

Section 339 of Municipal Act is the only one that gives a right of action. Section 338 vests the roads mentioned in the Council; it does not refer to roads laid out by the Council: *Mytton v. Duck*, 26 U. C. 61.

On the remaining point, that of nonsuit, there was a variance between the evidence and the allegation, the County of York being the venue laid in the declaration, while the injury was proved to have taken place in the County of Simcoe. The Court cannot take judicial notice that Bradford is not in York: *Richardson v. Locklin*, 6 B. & S. 777; *Dybel's Case*, 4 B. & A. 243; *Cook v. Stratford*, 13 M. & W. 379, *Brune v. Thompson*, 2 Q. B. 789; *Boydell v. Harkness*, 3 C. B. 168-175; *Clayton v. Best*, 8 L. T. N. S. 502; *Smith v. Smyth*, 10 Bing. 405.

M. C. Cameron, Q. C., contra.

The Municipal Act defines what are roads: *Ferguson v. Howick*, 25 U. C. 547; *Simmons v. Lillystone*, 8 Ex. 431.

DRAPER, C. J., OF APPEAL.—The argument in this Court resolves itself into two points.

1. The duty of the appellants to keep the road in repair.
2. The objection that the venue is laid in the County of York instead of the County of Simcoe, on which objection the appellants rest their application for a nonsuit.

(1.) The inhabitants of the village of Bradford, in the County of Simcoe, petitioned the Legislature of Canada that they might be incorporated as a village, and the Act (a public Act, by its last section) 20 Vic. ch. 98, was passed in pursuance of their petition. Thereby a tract of land described by metes and bounds, being part of "the Township of West Gwillimbury, in the County of Simcoe," was declared to be a village, and was incorporated by the name of the village of Bradford, and the Upper Canada Municipal Corporation Acts were declared to apply to the said village. This Act was passed on the 27th May, 1857. The nuisance complained of by the respondent, was the non-repair of a road within the boundaries defined by the Act, and which road was a part of one mentioned in schedule A to the Statute of Canada, 9 Vic. ch. 37, and therein designated as "the Main North Road from Toronto to Lake Huron, at Penetanguishene."

Whether this Main North Road was constructed upon the allowances for road laid out in the original survey of the townships through which it passed, or on land acquired by the Commissioners of the Board of Works, under the authority vested in that body, does not appear. In either case the soil and freehold was in the Crown, as a public highway. But the Municipal Council's Act, 12 Vic. ch. 81, sec. 37, enacts "that whenever any County Council assumed by by-law *any* highway, &c., (making no reservation) within any township, as one in which more than one township, or the whole County, was interested, such Council should put such road in substantial order; and as long as such by-law should be unrepealed, the township municipality should cease to have any jurisdiction or control over it as respects making, maintaining, &c., the same.

The Municipal Council of the County of Simcoe passed a by-law on the 20th June, 1851, assuming and establishing as a public highway and County road a part of the Main North Road above mentioned, being in the Township of West Gwillimbury, and, as I understand, passing through the (now incorporated) Village of Bradford, and imme-

diately after passing this by-law, they planked the road. By the Act 14 & 15 Vic. ch. 5, a part of the Township of West Gwillimbury was declared to be in the County of Simcoe, and the highway referred to in this suit passed along and through that part of the Township of West Gwillimbury; and the County of Simcoe repaired and maintained that part of the highway until the 7th of October, 1856, when they passed a by-law repealing that which had been passed on 28th June, 1851. Since then it is shewn that the Municipal Corporation has, from time to time, incurred expense in repairing this particular portion of the road, so far admitting that it was under their management and control. On this appeal, however, they contend that they only made these repairs as a matter of self-interest, as without them "they could not get out, or people come to them," and on affirmance of this they gave evidence that they had made repairs to the bridge which was beyond their municipal boundaries.

I am, however, of opinion that upon the facts appearing, this is a public highway within the meaning of the 338th section of the Municipal Institutions Act of 1866, admitting that the right of soil remains in the Crown, and that the appellants are under that and the following section bound to keep it in repair. The road, in its full extent, was laid out or opened by the Government, and a considerable sum of money was appropriated for it by Parliament, and was expended upon it long before the appellants were incorporated. It is not, therefore, a case in which a by-law, was necessary under the exception contained in the 339th section of the Municipal Institutions Act.

2nd. Then as to the question of nonsuit. The allegation in the declaration is, that the appellants were possessed of a road within the limits of the incorporated village of Bradford. No venue is laid in the body of the declaration, but in the margin we find, "County of York, to wit." The nuisance is therefore charged in respect of a road in that County; but the proof was of a nuisance within the limits assigned by the Statute to the Corporation of the Village

of Bradford, which limits are wholly within the County of Simcoe. The action is local, and the appellants claimed that plaintiff should be nonsuited. The Court below decided that the declaration was demurrable; but the question appears to arise, whether the second plea does not raise the question of locality, and if it does, whether upon the evidence the plaintiff should not have been nonsuited.

Our rule of pleading prohibits the statement of a venue in the body of a declaration, and therefore the material fact of the defendants' possession, &c., of the highway, is to be treated as laid in the County of York. The defendants' plea denies the possession alleged, and issue is joined on this plea. Now (waiving for the moment the consequences of defendants not having demurred) the evidence established a negative of the allegation, that the defendants were possessed of a highway in the County of York. This fact was material, and was traversed. The plaintiff failed to sustain the affirmative. The action was local. Why, on this record, should a nonsuit be refused? As I understand, the answer given to this question is, that the Court must take judicial notice that the Statute incorporates the village of Bradford *in the County of Simcoe*, and that it therefore appears on the record that the cause of action, as it is local, arose in that County; wherefore the defendants should have demurred. The majority of this Court are of opinion that under these circumstances the application for a nonsuit must fail, and therefore the appeal should be dismissed. I have not been able to see my way to that conclusion. The plea appears to me to have put the locality in issue; the plaintiff has joined issue, and the affirmative is on him, and he fails in proof. I cannot see why he should not have been nonsuited. If there had been no issue on the record involving the question of locality it might have been different. The defendants applied for a nonsuit at the trial: it was refused, with leave reserved. The verdict for plaintiff cannot afford a presumption in favor of plaintiff under these circumstances, and it cannot be urged that the

Judge at *Nisi Prius* could adjudicate that the declaration was demurrable, and *therefore* he would not nonsuit, although the plaintiff failed in proving the issue. In *Wells v. Abraham Cockburn*, C. J., remarked, "The Judge at *Nisi Prius* is merely a Commissioner, and the instrument of the Court to try the cause: it is his duty, therefore, to try the issues on the record"; and see his remarks in giving judgment. How in this case could it be decided on the record at *Nisi Prius* that the declaration was bad?

SPRAGGE, C.—At the hearing of the appeal in this case the Court held, upon the authority of *The Mayor and Corporation of Berwick upon Tweed v. Shoumks* (3 Bing. 459), and of *Taylor v. Barclay* (2 Sim. 213), that, the venue being local, the declaration was demurrable, and that, not having been demurred to, the defect was cured, and would not be ground for nonsuit. The declaration in this cause was demurrable because the venue was laid in the County of York, while the neglect of statutory obligation, for injuries arising out of which the action was brought, was laid in the village of Bradford, the neglect being the non-repair of "a certain street, road, or public highway within the corporation limits of the said village of Bradford," which the declaration alleges was "possessed" by the corporation, the Court taking judicial notice that the village of Bradford is not in the County of York, but in another county, the County of Simcoe. The pleas are—1st, not guilty; 2nd, not possessed; and 3rd, the Statute of Limitations. The only question arises upon the second plea and upon the statutory obligation to repair the road.

The issue upon the second plea appears to me to be whether the defendants were possessed of this road, with a liability to keep it in repair. And first as to the locality. *Primâ facie*, apart from that of which the Court takes judicial notice, the intendment would be that the averment was in respect of a road in the County of York, the venue being laid in that county; but this intendment

cannot prevail, but is negatived by a fact, of which the Court takes judicial cognizance, that fact being that Bradford is in the County of Simcoe. If the plaintiff is not bound by the *prima facie* intendment, and the defendant cannot take advantage of it, the averment of locality must be in respect of a road in Bradford, which is in fact in the County of Simcoe; and it cannot lie in the mouth of this corporation to say that the plaintiffs alleged or that they denied that they were possessed of a road in the village of Bradford, in the County of York. That position, indeed, appears to be involved in the conclusion arrived at, at the hearing of the appeal, that the bill was demurrable. Why ought the defendants to have demurred, except that, the fact being that Bradford was in the County of Simcoe, and judicial cognizance being taken of that fact, the plaintiffs cannot be taken to have averred it to be in the County of York? The defendants cannot say that the averment could properly be taken to mean a road within the limits of Bradford in the County of York; for, if so, they could not demur. The obligation upon them to demur presumes that they had cognizance of the fact, as of course they had, that Bradford was in the County of Simcoe, and that the plaintiffs, having cognizance of the same fact, had improperly laid their venue in the County of York.

I do not mean to say that the point is a very clear one. The doubt of his Lordship the Chief Justice shews that it is not so; but the best consideration that I have been able to give to it leads me to the conclusion that I have given.

Upon the question of statutory liability to repair this road, I entertain no doubt, the sections quoted by Mr. Cameron, and referred to in the judgment of his Lordship the Chief Justice, from the Municipal Act of 1866, seem to make this quite clear.

HAGARTY, C. J.—The only substantial difficulty in plaintiff's way was, that there should have been a

nonsuit on the ground of variance in the plea denying defendants' possession of the road, set out in the declaration. In the case of an individual defendant, I think, as in *Richardson v. Locklin*, where marginal venue was in Surrey, and the declaration did not otherwise describe the road, on a plea traversing the way claimed, if it appeared to be in Essex, there should be a nonsuit. But I think we must read this declaration as setting out in the body a road in the County of Simcoe. If so, it was clearly demurrable, and the traverse, therefore, shewed no variance between allegation and proof.

STRONG, V. C.—Two questions were argued on the hearing of this appeal. In the first place, it was contended that the defendants were not liable to repair the road, the neglect to repair which has been found to have been the cause of the injury for which the plaintiff sues. It appears clear that the provision of sections 338 and 339 of the Municipal Act of 1866 are applicable to this road, and that the defendants are therefore liable to keep it in repair. The cases decided with reference to roads vested in companies, created by statutes, giving power to construct, maintain, and collect tolls on roads, manifestly have no application here, since roads so vested in companies are within the exception of section 338. Government roads constructed by the Board of Works are also excepted. But the road now in question, being shewn to have been transferred to the corporation, is one within the words of the clauses referred to, and no reason has been suggested, or authority cited, to shew that the provision of the Act ought to receive a less extensive construction than the language imports.

The second point which has been raised is a purely technical objection, which I think, with deference to the opinion of his Lordship the Chief Justice, fails. The venue in this action is local: *Richardson v. Locklin* (6 B. & S. 777); and therefore, if the name of the county stated in

the margin of the declaration is, pursuant to the rule of Court, number four, of 1856, to be considered as the statement of the county in which the wrong complained of was committed, the defendant ought to have succeeded in his motion for a nonsuit, inasmuch as the second plea puts in issue the possession by the defendants of the road stated in the declaration, which, if the venue in the margin is to be presumed as part of the description, is a road in the County of York, and the evidence establishes that the road in question is in Simcoe.

The plaintiff, however, insists that the declaration is to be considered as stating the road to be in the County of Simcoe, and therefore, although the variance on the face of the declaration between the venue and the locality of the injury alleged would have been good ground of general demurrer, it is no ground of nonsuit, and is an objection which is cured after verdict by the statute 16 & 17 Chas. II. cap. 8: *Hitchins v. Hollingsworth* (7 Moore's P. C. C. 228; *Boyes v. Hewetson* (2 Bing. N. C. 575); *Williams's Notes and Saunders's Reports*, Vol. I., p. 309; and this was the opinion of the Court of Common Pleas, and appears to be the correct view. The defendants are sued as the Corporation of the Village of Bradford, and the allegation of the declaration is, that "they are possessed of a certain road, street, or public highway within the corporation limits of the said Village of Bradford." The defendants, being thus sued as a local corporation, the Court, it would seem, is bound to take judicial notice of the public Act of the late Province of Canada, by which the corporation was created (20 Vic. cap. 98), and this Statute shews that the Corporation of Bradford is in the County of Simcoe. I therefore read the declaration as substantially containing the allegation that the defendants were possessed of a public highway in the Village of Bradford, in the County of Simcoe, in which case, although the defendant might have demurred, there would be no ground of nonsuit, inasmuch as the proof would accord with the averment, and the objection is one

which, as already shewn, cannot be made a ground for arresting the judgment of the Court below, which should be affirmed.

MORRISON, and GALT, JJ., concurred.

MOWAT, V. C., was not present when judgment was delivered.

Per curiam.—*Appeal dismissed, with costs.*

MICHAELMAS TERM, 36 VICTORIA, 1872.

(November 18th to December 7th.)

Present :

THE HON. JOHN HAWKINS HAGARTY, C.J.

“ “ JOHN WELLINGTON GWYNNE, J.

“ “ THOMAS GALT, J.

REGINA v. THE CORPORATION OF THE VILLAGE OF
YORKVILLE.

Bridge—Liability to repair—Mun. Act 1866, secs. 338, 339—Construction.

Where a bridge connecting two highways was dedicated to the public and in public use for a number of years, forming part of a thoroughfare on which houses had been built, for which it was the only direct mode of communication to the south, and for nine or ten years had been repaired by the municipality out of the public funds, although no by-law had been passed establishing or assuming it:

Held, that the municipality were bound to keep it in a proper state of repair.

Held, also, that sec. 339 of the Municipal Act of 1866 does not take away the common law liability.

Semle, that said section only declares the intention of the Legislature that the mere laying out of a road or the building of a bridge by private owners, should not by itself impose a criminal or civil liability on the municipality, or on the public represented by them.

THE defendants were convicted at the Quarter Sessions for the County of York for not repairing a certain bridge, known as the Rosedale Bridge, situate in the Village of Yorkville, leading north from Gwynne Street to Park Road, and crossing the ravine which separated these streets.

The evidence in substance was as follows: The owner of certain property known as the Rosedale estate, about the year 1854, laid it out in lots, and filed a plan in the registry office. The bridge in question was constructed in that year, and prior to the filing of the plan, at a cost of \$5,600. It connects a public highway with Park Road, and is the only means of communication for the Rosedale estate with the south, except by getting on to Yonge Street.

About the 27th July, 1857, the owner wrote a letter to the corporation, dedicating the bridge and the roads leading to and from it to the municipality, on receipt of which the corporation passed a resolution to the effect that no notice should be taken of the letter, but this did not seem to have been communicated to the owner. In the spring of 1864 a gate was placed across the Park Road north of the bridge for the purpose, as it was stated of keeping cows off the property, but the gate was not there in the following winter. At the time the property was laid out it was mortgaged, but a plan shewing the roads was attached to the mortgage, and the mortgagee assented to the plan, and sales were always made in accordance with it. It also appeared that the parties who purchased lots would not have done so if there had not been a bridge, and that its defective state prevented the sale of the lots.

A purchaser of one of the lots proved that he had received \$10 and two days' statute labour from the corporation to build a side road between his lot and the bridge, and that he had paid about \$1,000 for taxes; others also had paid large sums for taxes. Another purchaser proved that he had received from the corporation, in 1860, \$30 to macadamize the road leading north from the bridge. Evidence was also given that the bridge was out of repair in 1861 and 1862, and was repaired by the corporation, and had been repaired every year since, except the present year; but the repairs were done on the advice of counsel that the corporation would not by so doing become liable to uphold the bridge. It was proved that the amount expended was put in the estimates and expended generally. The road

on each side of the bridge was macadamized, and sidewalks put down on one of the streets leading to it.

It also appeared, from the evidence of the superintendent of the corporation, that he made repairs in 1862, expending about \$10, and a similar amount the next year : that the average sum expended in any one year was from \$30 to \$40, the highest from \$50 to \$70 : that planking was laid on the road leading from the north-east end of the bridge, and repairs were done on other parts of the road ; also seven or eight years ago he made repairs on the street called Gwynne Street leading south from the bridge, at a cost of between \$20 to \$30 ; that he cleaned the snow off the sidewalks of the lands of non-residents, and warned parties to keep snow off their sidewalks and this bridge : that he was paid by the corporation, who made a record of it in their books, and that there had been no obstruction since he had been in the employment of the corporation, which was about nine years. It also appeared that the Reeve had promised last January to have the bridge repaired, but nothing had been done, and that the bridge was used by a great number of persons. It was also proved that no by-law had ever been passed assuming the bridge.

The learned chairman, the junior Judge of the County Court, reserved a case for the consideration of this Court, the question being whether on the evidence adduced the corporation of the Village of Yorkville were bound in law to keep the bridge in repair, and postponed giving his judgment until the determination of the said question.

Harrison, Q.C., for the Crown, cited *Malloch v. Anderson*, 4 U. C. R. 481 ; *Regina v. The Inhabitants of Horley*, 8 L. T. N. S. 382 ; *Rossin v. Walker*, 6 Grant 619 ; *Regina v. Boulton*, 15 U. C. R. 272 ; *Regina v. The Great Western Railway Co.*, 21 U. C. R. 555 ; *Regina v. Hunt*, 16 C. P. 145 ; *Carrick v. Johnston*, 26 U. C. R. 69 ; *Daniel v. North*, 11 East 375, note ; *Regina v. The Inhabitants of the Tithing of East Mark*, 11 Q. B. 877 ; *Moore v. The Corporation of Esquesing*, 21 C. P. 277 ; *Regina v. Petrie*, 4 E.

& B. 737; *Mytton v. Duck*, 26 U. C. R. 65; *Rex v. The Inhabitants, &c., of Glamorgan*, 2 East 356, note; *Rex v. The Inhabitants, &c., of Northampton*, 2 M. & S. 262; *Rex v. The Inhabitants, &c., of the W. R. of Yorkshire*, 5 Burr. 2594; *Rex v. The Inhabitants, &c., of Leake*, 5 B. & Ad. 469, 482; *Foreman v. The Mayor, &c., of Canterbury*, L. R. 6 Q. B. 214; *Regina v. The Inhabitants, &c., of Newbold*, 19 L. T. N. S. 656; *Regina v. The Inhabitants, &c., of Bightside Bierlow*, 13 Q. B. 933; *Regina v. The Inhabitants, &c., of the Isle of Ely*, 15 Q. B. 827; *Rex v. The Inhabitants, &c., of Kent*, 2 M. & S. 513; *O'Brien et al. v. The Village of Trenton*, 6 C. P. 350; *Beaver v. The Mayor, &c., of Manchester*, 26 L. J. N. S. 311; *Harrold v. The Corporation of the County of Simcoe and The Corporation of the County of Ontario*, 16 C. P. 43.

M. C. Cameron, Q.C., contra, cited *Mun. Act 1866*, secs. 338, 339; *Harrold v. The Corporation of the County of Simcoe and The Corporation of the County of Ontario*, 16 C. P. 43; *The Corporation of Wellington v. Wilson et al.*, 14 C. P. 299; *McCarthy v. The Corporation of the Village of Oshawa*, 19 U. C. R. 245.

HAGARTY, C. J.; delivered the judgment of the Court.

The case does not come before us in a very regular form, but as it has been treated by both parties in argument as involving nothing but the question of legal liability, we may assume all the facts to be undisputed.

In 1854 the owner of the Rosedale estate laid it out into lots for sale, with certain roads leading from Yonge Street and on the south to other parts of Yorkville. A plan was filed in the registry office, and lots were sold according to it. The bridge in question is built over a deep ravine; and with the road leading to and from it, is the only communication from the south. Many persons have purchased properties close to or abutting on it.

In 1857 the owner addressed a letter to the defendants, produced at the trial but not furnished to us, said to be to the effect that he surrendered, or gave up, the bridge or the roads, (we cannot say which) to the municipality, and it

is said in the evidence that the defendants wrote back to the owner declining to accept his offer.

It is clear that for many years the bridge and approaches have been used and travelled by the public, and in every way used as a public highway. It is also clear that of late it has been and is in a dangerous state.

From about 1861 it was proved that the municipality had expended money in repairs to the bridge, averaging, as I understand, an annual expenditure of \$30 to \$40, from \$50 to \$70 being the highest at one time. As I understand the evidence of Thompson, he states that he was superintendent of Yorkville for nine years, and that all the work was done by defendants' orders and paid for by them from year to year. He proved also the usual enforcement of the law as to clearing snow from the sidewalks and from the bridge.

The owner proved that he had dedicated the road and bridge to the public.

It was proved that no by-law had ever been passed by the defendants to assume the bridge or road, and it was sworn that they were advised by counsel that what they did in the way of repairs would not make them liable to uphold the bridge.

We thus have a road and bridge unquestionably given up and dedicated to the public, used by the public for years, and certainly for nine or ten years repaired by the municipality out of the public funds.

The defendants now disclaim all responsibility to the public for the dangerous condition to which this important line of communication to many of the ratepayers and the general public, has been reduced by non-repair.

That the bridge and approaches are now a public highway, out of the power of any individuals to close, is beyond controversy.

If the defendants be not responsible under such circumstances, the law is most defective and requires prompt amendment.

I have no doubt but that this highway falls within sec.

338 of the Municipal Act 1866 : " Every public road, street, bridge, or other highway, in a city, township, town, or incorporated village, shall be vested in the Municipality, subject to any rights in the soil which the individuals who laid out such road, street, bridge, or highway reserved," &c.

This section corresponds with section 336 of Consol Stat. U. C. ch. 54, and on that Draper, C. J., says, in *Mytton v. Duck et al.* (26 U. C. R. 65) " But as against the grantee and those claiming under him, the public user without objection or interference on their part would furnish conclusive evidence of dedication, and then this road would, under the 336th section, be vested in the municipality, not perhaps in the strict letter, but within the spirit of the language used, the dedication by permissive user being equivalent to laying out of the road."

Section 316 of the last Act is the same as section 314 of the former : " Unless otherwise provided for, the soil and freehold of any highway or road altered, amended or laid out, according to law, shall be vested in Her Majesty, Her Heirs and Successors."

In the same case, p. 64, Draper, C. J., also, says : " Sections 314 and 336," (Consol. Stat. U. C. ch. 54,) " must, if possible, be construed so as not to conflict. We think they may be so construed by limiting the operation of the latter, as suggested by Burns, J., in the *Corporation of Sarnia v. Great Western R. W. Co.* (21 U. C. R. 64), to cases where individuals have laid out streets or roads for the public, and they have by user or otherwise been adopted or confirmed as highways."

The defence rests wholly on the 339th section of the existing law.

Following the sections already cited in full, come the words, " Every such road, street, bridge, and highway shall be kept in repair by the corporation, and the default of the Corporation so to keep in repair, shall be a misdemeanor punishable by fine in the discretion of the Court, and the Corporation shall be further civilly responsible for all damages sustained by any person by reason of such default,

but the action must be brought within three months after the damages have been sustained; *and this Section shall not apply to any road, street, bridge, or highway laid out without the consent of the Corporation by By-law, until established and assumed by By-law.*"

As they have never passed any by-law assenting to the laying out or for assuming this bridge or road, they urge that no liability attaches.

If there were no such section in the Act, I am of opinion that the defendants would be clearly liable at common law to repair the bridge. They have almost unlimited power to levy money for such a purpose by assessment. They have most extensive powers over the management and conservation, stopping, opening, and altering roads, and must at least, I presume, be as extensively liable for non-repair as the Parish in England.

It is said, (*Rex v. Leake*, 5 B. & Ad. 484), "The adoption (of a road) by the parish is no more than the use of it by the public. The parish are merely a part of the public."

Here the statute says (sec. 1, Act of 1866) that the inhabitants of every County, Town, Village, &c., shall be a body corporate.

The law seems succinctly stated in *Shelford on Highways* (1865, 3rd ed., p. 23): "It was once held, where there was no evidence that the parish had acquiesced in the dedication of a road to the public, that it was not a public road which the parish was liable to repair; *Rex v. St. Benedict*, 4 B. & Al. 447; on the ground that, as a parish had no power to prevent the opening of a road or to obstruct the public use of it, it would be most unjust if, by the public use of what was at first a private road, the burthen of repairing it could be removed from the persons to whom the use of it was at first confined, and cast upon the parish. But it has been since held, that a road dedicated to and used by the public becomes a highway, which the parish must repair, although neither such dedication nor such user has been adopted or acquiesced in by the parish; *Rex v. Leake* (2

Nev. & M. 583 ; S. C. 5 B. & Ad. 469 ; and see *Rex v. Lyon*, 5 D. & R. 497. But it is doubtful whether one act of repairing on the part of the parish will be construed as an adoption of a highway ; *Ib.* It was laid down by Parke, J. (*Rex v. Leake, supra*), that, at common law, a parish is bound to repair all *public* highways, that being the mode by which each parish contributes its share towards the public burthen of repairing all highways, instead of all the public roads being repaired by one general tax. Hence, if a road be dedicated to the public, no parish can refuse to repair it. It must bear in that shape its share of the general burthen, and its inhabitants receive an equivalent, not in the use of that road in particular, but in the use of all the public roads in the realm. The absence of repair by the parish is indeed a strong circumstance in point of evidence to prove that the road is not a public one. The fact of repair has a contrary effect, but the conduct of the parish in acquiescing or refusing its acquiescence seems to be immaterial in every other point of view ; 5 B. & Ad. 482." The cases cited fully bear out this extract.

Satisfied as I am of the common law liability, I have to consider whether the presence of this 339th section restricts or affects the application of the common law.

In *The Eastern Archipelago Co. v. The Queen* (2 E. & Bl. 879) Williams, J., says : "It is a familiar doctrine that though where a statute makes unlawful that which was lawful before, and appoints a specific remedy, that remedy must be pursued and no other, yet where an offence was antecedently punishable by a common law proceeding, as by indictment, and a statute prescribes a particular remedy in case of disobedience, that such particular remedy is *cumulative*, and proceedings may be had either at common law or under the statute."

Here it may be argued that there is no *particular* remedy given, and that the Legislature must have intended that this 339th section comprised the whole law on the subject of criminal or civil remedy for non-repair.

In *Rex v. Carlisle* (3 B. & Al. 165), Best, J., says : "It

has long been a settled maxim, that neither the provisions of the common or statute law are abrogated but by the express words of an Act of Parliament, or by subsequent enactments, so inconsistent with the previous law as to raise a necessary implication that the Legislature intended it should be altered."

In books treating on construction of offences both at common law and by statute—such as *Dwarris*, *Hale*, P.C., *Hawkins*, P.C.—I have not found any case in which a statute merely repealed the common law obligation without adding to the remedy or providing a more summary proceeding.

Here the section declares a corporation's default to repair to be a misdemeanor punishable by fine. This leaves it as at common law. Then comes the civil remedy: that is, the same remedy that would exist at common law. Then it says, "but the action must be brought within three months after the damages have been sustained." This appears to be a limitation of the common law right. Then comes the concluding clause, that *the section* shall not apply to roads or bridges laid out without an assent by by-law, unless established and assumed by by-law.

Literally, therefore, as, it is insisted, there was no by-law, the section 339 is not to apply.

It may be that this will be urged to be a narrow construction, and that both as to the criminal and the civil liability the section worked a positive alteration in, and limitation of, the common law. I think that we need not be driven to a mere literal construction, but that we may fairly consider that all the Legislature meant to provide was, that the merely laying out of a road, or the building of a bridge by private owners, shall not thereby cast a criminal and civil liability on the municipality, or on the public represented by them.

It is very easy to imagine cases where such a provision should most properly apply, especially in a country where such large open spaces are included in town and city limits—in some cases containing tracts of land in their original state.

A landholder might merely for his personal convenience stake out a road half a mile long through his land, cleared or uncleared, and declare that he dedicated it to the public. Such a proceeding by itself should not render the municipality liable. But after this is done, and for a long series of years the public (alias the municipality) use the road as a frequented thoroughfare; houses are built along it, as their chief if not their only way of egress and ingress, and which houses are forthwith taxed by the municipality; repairs are regularly done to it every year by the road officers out of the public moneys; it would then, I think, be an unparalleled state of the law if it lie in the mouth of the municipality to declare that they are under no responsibility.

It is a case in which, according to the old language, Judges should be "astute" to find grounds for upholding a rational construction of the law to prevent great injustice.

Our own Courts have somewhat discussed the general question. In *The Corporation of Wellington v. Wilson* 14 C. P. 304 A. Wilson, J., delivering the judgment of the Court, says: "Apart from section 337 (same as section 339) which imposes the burden of repairing the roads within the respective municipalities upon the municipalities in which they were situated, the common law duty would apply to all such bodies, to repair the roads which are within their jurisdiction, and for which they can raise the funds required for the purpose. "The case did not necessarily turn on this question. In *Harrold v. The Corporation of the County of Simcoe and The Corporation of the County of Ontario* (16 C. P. 50) the same learned Judge says, "That section 337 does not mean Counties we do not consider of much importance; for we are of opinion, for the reasons hereafter given and upon the authority of decided cases, that there is a clear common law liability resting upon the defendants both civilly and criminally." In the same case in Appeal (18 C. P. 13) the late Chancellor Vankoughnet said: "It is true that the County is not by the Municipal Act in express terms made liable for such default; but I

take it that a corporation charged with or assuming the custody of a road or bridge, and having funds or the means of obtaining funds, by exacting tolls, or levying a rate upon the members of the corporation, with which to make repair, is at common law bound to keep such road or bridge in an efficient state." Draper, C. J., giving the judgment of the Court did not specially notice or discuss this point, but the decision of the Common Pleas was affirmed, holding the County liable.

I have arrived at the conclusion that the defendants are responsible. I have given the matter the more attention, as I find to my regret that our decision is apparently without appeal.

GWYNNE, J., was not present at the argument.

GALT, J., concurred.

Judgment for the Crown.

SAVAGE V. DEACON.

SMYTHE V. DEACON.

Elections—Postmasters.

Held, that a postmaster of a city is not liable to a penalty for voting at an election for a member of the House of Commons of the Dominion of Canada.

But, *Seemle*, per Hagarty, C.J., he is not entitled to vote, and should he do so his vote might be struck off on a scrutiny.

DEMURRER.—Declaration: For that the defendant is indebted to the plaintiff in the sum of two thousand dollars, and the plaintiff demands said sum from the defendant. And the plaintiff alleges that—after the passing of the Act respecting elections of members of the Legislature, Consol. Stat. C. ch. 6, and after the passing of the British North America Act, 1867, and of the Act of the Province of Ontario respecting elections of members of the Legislative Assembly, 32 Vic., ch. 21, and after the passing by the Parliament of Canada of "the Interim Parliamentary Elections Act, 1871," and of the 35 Vic. ch. 14,—at an election in and for the City of Kingston of a member to serve in the House

of Commons of Canada, at which said election Sir John Alexander Macdonald and John Carruthers were opposing candidates, and a poll being demanded and opened in the said city of Kingston according to the provisions of the said Act Consol. Stat. C. ch. 6, and of the said "the Interim Parliamentary Elections Act, 1871," for the taking and recording of votes at said election of a member to serve in the said House of Commons of Canada, the defendant, then being the postmaster of the said City of Kingston, and as such postmaster of a city disqualified from voting at said election, voted for the said Sir John Alexander Macdonald at the said election of a member to serve in the House of Commons of Canada, contrary to the Statutes in that behalf, and contrary to the said Consol. Stat. C. ch. 6, and contrary to the said Act of the Province of Ontario, 32 Vic. ch 21, and contrary to the Interim Parliamentary Elections Act, 1871, whereby the said defendant became liable to forfeit, and did forfeit the said sum of \$2000, and the plaintiff sues for the same. And the plaintiff further alleges, that the defendant at the time of so voting as aforesaid was a postmaster in a city, to wit, the postmaster in said City of Kingston, as aforesaid; and the particular offence for which the action is brought is, that being such postmaster he voted at said election as hereinbefore stated, and the plaintiff claims as well for the said Queen as for himself, the said sum of \$2,000.

The defendant demurred, on the grounds—1. That no penalty under any Statute attaches to the defendant as such postmaster voting at an election for a member to serve in the House of Commons of the Dominion of Canada. 2. That there is not any Statute which gives to the plaintiff the said cause of action against the defendant, being a postmaster, for voting at the said election. 3. That the defendant, so being such postmaster, is not prevented from voting at such election, and that he is not disqualified from voting at such election.

Harrison, Q. C., for the demurrer, cited *Dwarris* on Stats. 2nd ed. 634; and *McDonell v. Smith*, 17 U. C. R. 321;

McDonell v. Vankoughnet, 17 U. C. R. 339 ; *McDonell v. Macdonald*, 8 C. P. 498, 511, 516 ; *Stephenson v. Higginson*, 3 H. L. Ca. 638.

Britton, contra, cited *Garrett v. Messenger*, L. R. 2 C. P. 583.

The Statutes cited are referred to in the judgment.

The case of *Smythe v. Deacon* was a similar case ; the same grounds were raised by demurrer, and the argument was the same, as well as the cases cited.

Harrison, Q. C., for the demurrer.

Kirkpatrick, contra.

GALT, J.—These actions are brought against the defendant for having voted at the last election in and for the City of Kingston for a member to serve in the House of Commons of Canada, he, the said defendant, at the time when he so voted being postmaster of the City of Kingston, whereby it is alleged that he has subjected himself to a penalty of two thousand dollars. The question for our decision is the same in both actions, and is raised by a demurrer to the declaration, the question being whether a postmaster of a city is liable to a penalty for voting at an election for a member of the House of Commons.

By sec. 1 of Consol. Stat. C. ch. 6, an Act respecting elections of members of the Legislature, certain persons are declared to be disqualified from voting at elections for members of the Legislature ; and by sec. 2 all persons mentioned in that section who voted at such election shall forfeit the sum of two thousand dollars. Section 1 does not include persons in the position of the defendant.

By "An Act respecting the Provincial Post Office," Consol. Stat. C. ch. 31, sec. 38, under title "Departmental Matters—Postmasters," it is enacted that "To the Postmasters at Quebec, Montreal, Three Rivers, and Sherbrooke, and at any incorporated City or Town in Upper Canada divided into Wards, and to the other Officers of the Post Office Department, except only the Postmasters at places other than those aforesaid, all the provisions of the *Act respecting*

Elections of Members of the Legislature, shall apply, as if they were officers of the Customs or Excise, and they shall not vote at the election of any Member of the Legislative Council or of the Legislative Assembly, under the penalties of the said Act imposed for contravention thereof in like cases."

This was the state of the law at the time of the passing of the British North America Act, 1867, and under it any postmaster of any city in Upper Canada divided into wards was prohibited from voting under a penalty of two thousand dollars. By the 41st section of that act "Until the Parliament of Canada otherwise provides, all Laws in force in the several Provinces at the Union relative to the following Matters or any of them, namely—the Qualifications and Disqualifications of Persons to be elected or to sit or vote as Members of the House of Assembly or Legislative Assembly in the several Provinces, the Voters at Elections of such Members," &c., "shall respectively apply to Elections of Members to serve in the House of Commons for the same several Provinces." By the 84th section of the Act, it is enacted that "Until the Legislatures of Ontario and Quebec respectively otherwise provide, all Laws which at the Union are in force in those Provinces respectively, relative to the following Matters, or any of them, namely—the Qualifications and Disqualifications of Persons to be elected or to sit or vote as Members of the Assembly of Canada, the Qualifications or Disqualifications of Voters," &c., "shall respectively apply to Elections of Members to serve in the respective Legislative Assemblies of Ontario and Quebec."

From the foregoing provisions it is manifest that after the passing of The British North America Act, 1867, the power of legislating on the qualifications and disqualifications of voters at elections for members of the House of Commons was confined to the Parliament of Canada, and as regards voters at elections for the Legislative Assemblies of Ontario and Quebec, to the Legislatures of those Provinces respectively.

By the 2nd section of an Act passed in the first session of the Parliament of Canada, 31 Vic. ch. 10, entitled "An Act for the regulation of the Postal Service," "All Laws in force in the Provinces of Canada, Nova Scotia or New Brunswick, at the Union thereof on the first of July, one thousand eight hundred and sixty-seven, in respect to the Postal Service, and continued in force by the "British North America Act, 1867," shall be and the same are hereby repealed, except as to any act done or performed in virtue of the same, and except in respect of any postage duties which may have become payable under the same, or any proceedings for the recovery of such duties, and except also as to any offence committed against the provisions of the said Laws hereby repealed, and any Fine or Penalty incurred by reason of any such offence, or any proceeding for the recovery of any such Fine or Penalty, or for the punishment of any offender."

It was contended before us that the foregoing section did not have the effect of repealing sec. 38 of ch. 31, Consol. Stat. C., because that section had reference to matters not strictly coming under the head of matters relating to the Postal Service; but it appears to me that considering the principal object of the Act was to assimilate the post office regulations of the Province of Canada, Nova Scotia, and New Brunswick, it must be construed to have had that effect, for otherwise officers appointed and acting under the Act regulating the Postal Service might be subjected to disabilities and penalties in the Provinces of Ontario and Quebec, to which they might not be liable in the sister Provinces of Nova Scotia and New Brunswick.

By the Ontario Statute 32 Vic. ch. 21, the Consol. Stat. C. ch. 6, so far as relates to the Province of Ontario, has been expressly repealed, and other provisions made as regards "who shall not vote at elections," whereby it is expressly enacted that, among other public officers therein mentioned, all postmasters in cities and towns shall be disqualified and incompetent to vote at any election; "and if any public officer or person mentioned in this section votes at any such election, he shall thereby forfeit the sum

of two thousand dollars, and his vote at such election shall be null and void." This Act was passed on the 23rd of January, 1869, and the law then was, as it appears to me—that as respects elections to the House of Commons postmasters in the position of the defendant could vote, but that as regards elections to the House of Assembly they could not.

In 1871, the Parliament of Canada passed an Act, 34 Vic. ch. 20, entitled "An Act to make temporary provision for the Election of Members to serve in the House of Commons of Canada." The second section enacts that, "The laws in force in the several Provinces of Canada, Nova Scotia, and New Brunswick at the time of the Union, on the first day of July, 1867, relative to the following matters, that is to say:—The qualifications and disqualifications of persons to be elected or to sit or vote as Members of the Legislative Assembly or House of Assembly in the said several Provinces respectively, the voters at Elections of such Members, the oaths to be taken by voters, the powers and duties of Returning Officers, and generally the proceedings at and incident to such elections shall, as provided by the British North America Act, 1867, continue to apply respectively to Elections of Members to serve in the House of Commons for the Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, subject to the following exceptions and provisions, that is to say:" &c. By the second sub-section of this Act provision was made for qualification of voters in Ontario and voters' lists. This second sub-section was repealed by An Act to amend the Interim Parliamentary Elections Act, 1871, by the second section of which it is enacted that, "In the Province of Ontario, subject to the special provisions hereinafter made," (these provisions have no relation to the present discussion,) "the qualification of voters at elections for members of the House of Commons shall be that established by the laws in force in that Province on twenty-third of January, 1869, as to the qualification of voters at elections for members of the Legislative Assembly, and the voters' lists, to be used

at elections of members of the House of Commons shall be the same as if such elections were of members of the Legislative Assembly, on the basis of the qualification aforesaid, and the polling sub-divisions, or wards, shall be the same as if such were for members of the Legislative Assembly," &c.

It was contended that because in the 2nd section of the Act to make temporary provision for the election of members to serve in the House of Commons of Canada, the laws in force in the Province of Canada on the first day of July, 1867, relative to voters shall continue to apply to elections of members to serve in the House of Commons, that the restrictions imposed on postmasters by the Act Consol. Stat. C. ch. 31, sec. 38, are revived, although that Act has been expressly repealed. But such section is declared to be subject to certain exceptions and provisions, as already stated. These provisions declare that the qualifications of voters in the Province of Ontario shall be that established by the laws in force therein on the 23rd of January, 1869, and is entirely silent as to any disqualification or penalty to be imposed. It is also to be remarked that the second section itself has no reference to penalties.

Under these circumstances, I am of opinion that we would not be justified in holding that the penalty inflicted on postmasters by the Consol. Stat. C. ch. 31, is still in force, and further that such penalty is to be imported into the construction of the Act of 1872, when the Act itself refers only to the qualification of voters, and defines who are to vote, but says nothing whatever respecting persons who are by the laws of Ontario forbidden to vote.

In my opinion the defendant is entitled to our judgment.

HAGARTY, C. J.—When the British North America Act was passed postmasters in Ontario were prohibited from voting at Parliamentary elections, not by any general election law, by which certain specified classes and individuals were disfranchised, but by the General Post Office Act, as a departmental regulation, which declared that the

general disqualifying provisions in the election law, with its penalties, should apply to them as if they were officers of the Customs or Excise.

The Confederation Act in substance adopted all existing qualifications and disqualifications of voters for the House of Commons, until otherwise provided for by the Parliament of Canada.

We next find the latter body in their first session passing a General Post Office Act, extending over all the Confederation, and declaring the repeal of all laws in force respecting the Postal Service at the date of confederation except as to past matters.

This repeal, in my judgment, clearly put an end to the disqualification of postmasters under the former Act, which disqualification existed only by virtue thereof. Section 46 provides new regulations as to postmasters and their sureties, and duties and responsibilities. The disqualifying clause 38 of the old Act seems pointedly omitted in the new Postal Act. The following section, 39, takes up almost in the old words the matters to be done in the appointment of postmasters.

Then the Interim Act of 1871, passed by the Parliament which had previously repealed the Postal Act with its disqualifying clause, declares generally that the laws in force in the different Provinces at the Union relative to voters at elections, the oaths to be taken by them, &c., and generally the proceedings at and incident to such elections, *shall continue* to apply to elections, with certain exceptions.

I do not think that such a provision could by itself revive a highly penal clause in a repealed Act, such Act not being of a general character in relation to elections, but a matter of internal management and arrangement of a public department.

The words in the Interim Act are "shall continue to apply." Such language, I think, is inapplicable to a law expunged from the Statutes by the same Legislature.

Ought we not to read it thus, "The laws, &c., shall continue in force, *except so far as the Legislature may have altered or repealed them.*"

Besides the suggestion of my brother *Galt* as to postmasters in the Maritime Provinces, there might have been this result: A postmaster appointed after the repealing Act at any election prior to the Interim Act might have lawfully voted. If therefore the words in the latter Act bear the wide meaning urged by the plaintiff, the same postmaster would by their operation be disfranchised; and again, if the Interim Act, (which is limited to two years) were allowed to expire without fresh legislation, his franchise would return to him.

It is evident that the idea of changes made in voters' qualification since the Union was present to the mind of the Legislature in passing the Interim Act. Sec. 4 declares that in Nova Scotia the revisors, when preparing the Electors' list for the Assembly, shall also prepare a like list of voters for members for the Commons, by adding to the list of voters for the Assembly the names of Dominion officials qualified to vote for members of the Assembly under the laws of Nova Scotia on 1st July, 1867, "*but who may have been disqualified by any Act of the Legislature of that Province passed after said day.*" This is the opposite of the present case. It restores the franchise to those deprived of it since the Union by local legislation, but only so far as the elections to the Commons were concerned.

Then the Act of 1872, amending the Interim Act, declares that in Ontario the qualification of voters for the Commons shall be that established for qualification for voters for the Assembly on the 23rd January, 1869; but it is silent as to disqualifications or penalty.

This Ontario Act, amongst the qualifications of voters puts in the words, "and not being disqualified under the preceding sections, or otherwise by law prevented from voting."

The preceding sections had certainly disqualified the plaintiff as a postmaster, and imposed the \$2000 penalty.

It seems to me that on this legislation the defendant had no right to vote, and his vote might have been struck off on a scrutiny, inasmuch as the persons *qualified* to

vote in Ontario were persons not *disqualified* by the preceding portion of the Act.

But this leaves the question as to liability to the penalty still to be settled.

I do not think that, on the general principles of construction of Statutes, the mere adoption of the Ontario qualification as the Dominion qualification, necessarily adopts the heavy penalty specially provided for voting at the Ontario elections.

GWYNNE, J., concurred.

Judgment for defendant.

KING V. MILLER ET AL.

Action on a promissory note—Compromise of another note on the assurance that it was the only claim—Pleading.

Declaration against the defendants as executors of one K. upon a promissory note for \$2,600, made by K. on the 17th Sept. 1867, payable to the plaintiff, or bearer, four months after date.

Plea, on equitable grounds, that the plaintiff in 1869, brought an action against K. on a note for \$5000, alleged to have been made by K., payable to plaintiff; that after K.'s death the case was revived against defendants, who pleaded that the note sued on therein was not made by K.; that such cause of action was settled before trial between the plaintiff and the defendants by a compromise, and defendants paid \$2000, in full satisfaction of the plaintiff's claim on said note; and the defendants averred that this settlement was agreed upon as a compromise and settlement of all claims of the plaintiff against K. and his estate, and upon the assertion of the plaintiff that the claim in said action was his whole and only claim against such estate.

Replication, upon equitable grounds, that the agreement mentioned in the deed is in the words following—setting forth verbatim a deed-poll executed by the plaintiff, whereby after reciting that the plaintiff had commenced an action against the defendants upon a note for \$5000, and that it has been agreed "*to settle said suit*" for \$2000, the plaintiff, for the consideration aforesaid, released the defendants and the estate "from all the payments of said note," and from all costs connected therewith and the prosecution of said suit.

Rejoinder, upon equitable grounds, that the release set forth in the replication was executed by the plaintiff and accepted by the defendants, and the moneys therein mentioned agreed to be paid and paid upon the plaintiff's assertion and assurance that the claim in said action in the plea mentioned was the whole and only claim against

the estate of K., and it was only on the faith thereof that defendants accepted the said release, and agreed to pay the said money.

- Upon demurrer to the rejoinder, and exceptions to the plea and replication: *Held* 1. That the rejoinder was bad (1), as admitting that the agreement, alleged in the plea to have been a compromise of all claims, was the document set out in the replication, which was confined to the other suit, and yet relying on the averment that such compromise was procured by the plaintiff's assertion that he had no other claim; and (2) because the compromise of a claim upon the plaintiff's assertion that it is the only one, will not of itself form an equitable defence to another claim the right to recover in respect of which is not otherwise contested.
2. That the replication was bad, as it admitted that the compromise, which was stated in the plea to include all claims, was the release set out in the replication, which was confined to a particular suit, and as offering no answer to the plea.
 3. That the plea itself was bad, and open to the exceptions taken to it.

DECLARATION against Robert Miller and Hugh Wilson King, executors of Robert Hunter King deceased, on a promissory note for \$2,600, made by the said Robert Hunter King, on the 17th September, 1867, payable four months after date to the plaintiff or bearer.

Seventh plea, on equitable grounds, that the plaintiff heretofore, to wit, on the 1st June, 1869, brought an action in Her Majesty's Court of Queen's Bench against the said Robert Hunter King, on a promissory note alleged by him to be made by the said R. H. K. for \$5,000, and such proceedings were then had, that after the said R. H. K. died, the said case on said note was revived against the present defendants, who pleaded in that action that the note sued on therein was not made by the said R. H. K.: that said cause of action in this plea mentioned was before the trial thereof settled by and between the plaintiff and the defendants by way of compromise, as follows:—that the plaintiff should accept from the defendants as such executors, who then agreed to pay, and did pay \$2,000 in full satisfaction of the claim of the plaintiff on said note; and that this settlement of said suit, and the undertaking of the defendants to pay said sum of \$2,000, was agreed upon as a compromise and settlement of all claims of the plaintiff against the said R. H. K. and his estate, and upon the assertion of the plaintiff that the claim in said action

was his whole and only claim against the estate of the said R. H. K. And the defendants aver that they have done on their part all things necessary to carry out said agreement.

Second replication, on equitable grounds: that the agreement in said plea mentioned and referred to was and is in the words and figures following, that is to say: "To all whom these presents may concern, I, Clark King, of the Township of Nelson, yeoman, send greeting. Whereas I have lately instituted an action in Her Majesty's Court of Common Pleas against Robert Miller and Hugh Wilson King, as executors of the late Robert Hunter King, to secure the amount of a promissory note for the sum of \$5,000, dated the 20th day of May, 1868; and whereas it has been agreed to settle said suit for the consideration of \$2,000. Now know ye, that for the consideration aforesaid, I, the said Clark King, do hereby remise, release and discharge the said Robert Miller and Hugh Wilson King, both personally and as executors as aforesaid, and also the estate of the said Robert Hunter King, of and from all the payment of said note, and of and from all costs, charges, and expenses connected therewith, and the prosecution of said suit.

"Witness my hand and seal this 25th day of April, A.D. 1872.

"Signed and sealed } in the presence of } (Sd.) "J. WHITE. }	(Signed) CLARK KING. [L.S.]"
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Rejoinder, on equitable grounds, that the release in said replication was executed by the plaintiff and accepted by the defendants, and the moneys therein mentioned were agreed to be paid and were so paid upon the assertion and assurance of the plaintiff that the claim in said action in said seventh plea mentioned was his whole and only claim against the estate of the said Robert Hunter King. And the defendants say that it was only on the faith of said assurance of said plaintiff that they accepted said release and agreed to pay said money.

Demurrer to the rejoinder, on the grounds :

1. That the defendants admit the fact of the release in the said replication mentioned to be the agreement mentioned in their seventh plea, but seek by said rejoinder to import into the written release set out in *hæc verba* in the said replication, terms, operation, and conditions which do not appear on the face of it, thereby altering, qualifying, and enlarging the terms and effect of it by parol matter. 2. That the said release being an instrument in writing and under seal, cannot be varied or enlarged in its effect by parol matter. 3. That the said release being set up by the defendants in defence, and admitted by them, they cannot now nor does it lie with them to say that the same was procured by the plaintiff on the assertion and assurance, as in the said rejoinder set out, that the claim in the said first action was his whole and only claim against the estate of the said Robert Hunter King; and that the defendants should either stand by said release or repudiate it altogether, as they, the defendants, have no right to say it was obtained from the plaintiff on the representation of certain facts, thereby charging him with fraud. 4. That it is admitted by the said rejoinder the testator made the note declared upon, and there is nothing in the said rejoinder to shew that the cause of action on the said note was extinguished, released, suspended, satisfied, or paid, and that the agreement or release set out is under seal releasing the defendants from a cause of action different from the present one.

The defendants joined in demurrer, and gave notice of the following exceptions to the replication :—that said second replication affords no answer to said seventh plea, and does not deny the allegations mentioned in the same, that the settlement of the suit therein referred to was made upon the assertion of the plaintiff that the claim in said action was his whole and only claim, and that the undertaking of the defendants to pay, and the payment made by them were made upon such assurance and assertion, said allegations affording a good defence to this action.

The plaintiff also gave notice of the following exceptions to the plea : That it is admitted by the said plea that the

said testator, made the note sued on in this suit, and there is nothing in the said plea to shew that the present cause of action on the said note was extinguished, released, suspended, satisfied, or paid, and that the said agreement releases the defendants from a cause of action different from the present one.

McKenzie, Q. C., for the plaintiff, cited *Add. Con.*, 6th ed., 977; *Reis et al. v. The Scottish Equitable Life Assurance Society*, 2 H. & N. N. S. 19; *Yates v. Nash*, 8 C. B. N. S. 581; *Foster v. Dawber*, 6 Ex. 839; *Cook v. Lister*, 13 C. B. N. S. 543; *Wilson v. Braddyll*, 9 Ex. 718, 23 L. J. Ex. 227; *Canham v. Barry*, 15 C. B. 597; *B. & L. Prec.*, 3rd ed., 467, note, 671, note *a*.

Sadleir, contra.

GWYNNE, J., delivered the judgment of the Court.

The gist of these pleadings, (well or ill pleaded) as it appears to me, is, that the defendants in their plea allege that the compromise agreed upon and come to in the former action was a compromise of *all* claims of the plaintiff against King and his estate, adding further, that it was made and entered into upon the assertion and assurance of the plaintiff that the one sued upon was the only claim.

The plaintiff replies that the agreement of compromise alleged in the plea was in writing, which it sets forth, signed and sealed by plaintiff, and which contains a recital of the action only, and a release from the *particular note* sued on, and from all costs, charges, and expenses connected with *that suit*.

The defendants rejoin, that this release was executed by the plaintiff and accepted by the defendants, and that the moneys therein mentioned were agreed to be paid, and were paid, upon the assertion and assurance of the plaintiff that the claim in said action was his whole and only claim against the estate of King, and the defendants say that it was only on the faith of said assertion and assurance of plaintiff that they accepted the release and agreed to pay the said money.

I confess I do not see what object the pleader had in rejoining, unless he was of opinion that he strengthened the allegations in his plea by the final allegation in the rejoinder, "*that it was only on the faith of plaintiff's assurance that defendants agreed to pay the money,*" &c. ; but I think that the defendants have erred in thus rejoining, for the effect of the rejoinder is, I think, (although from the way it was put on the argument I did not then think it was) to admit the allegation that the agreement which defendants had pleaded in their plea as a compromise of *all* claims was the written document signed and sealed by the plaintiff, and set forth verbatim in the replication, and which recites the action there brought, and an agreement to settle and compromise it alone.

The rejoinder seems to involve a departure from this material allegation contained in the plea, and to rest the defendants' defence upon this, that the agreement for compromise set out in the replication, (admitting it to be only in respect of the action then pending, and to be the one upon which defendants relied,) was procured by the assertion and assurance of the plaintiff that he had no other claim, and upon the faith of that assurance; and the material issue offered is the point of law raised, that upon equitable grounds under such circumstances, the plaintiff should be estopped from now suing upon the note declared on in this suit, however indisputable it may be that the note was made by King in his life-time for good and valuable consideration, and for the purposes of this argument we must take it to have been so made.

There is no assertion in these pleadings that at the time of the compromise of the former suit the plaintiff, although the payee of the note now sued upon, had it in his possession, or that he fraudulently suppressed all knowledge of its existence from the defendants in order to obtain a compromise of the other suit, or knowing that if he mentioned its existence the defendants would not settle the other note in the manner then proposed; nor is there any allegation that the defendants themselves were ignorant of the

existence of the note now sued upon, or that there was any doubt as to its being a good and subsisting security for value to the amount appearing on its face, or that there was any reason why it should be compromised. It is consistent indeed with these pleadings that the plaintiff although the payee, may not have had it in his possession but may have negotiated it for value, and then acquired it again.

But the question raised is simply: Will a compromise made of a particular suit upon the assertion that the plaintiff had no other claim, operate as an equitable bar of another claim, although to such claim, and to the plaintiff's right to recover therein, there be no defence either at law or equity, other than the compromise so relied upon?

It does not seem to me that such could be the nature of the equity, if any, to which under such circumstances a defendant would be entitled, and no case to that effect has been brought under our notice. The equity, as it seems to me, which such circumstances would disclose would be, if the determining motive of the defendants on entering into the compromise of the former suit should prove to be the plaintiff's assurance, as here relied upon, to vest in the defendants a right at most to undo the compromise of the former suit, and so to put the parties in *statu quo*. And this is a claim which would have to be instituted in equity. The most that can be urged in favor of the defendants is, that under the circumstances pleaded, the plaintiff should be put to his election either to abide by the compromise of all claims, including that now sued upon, or to open the particular suit compromised; and if that be the nature of the equity asserted here, we cannot in this Court work out that equity, and so it does not disclose a good defence under the Common Law Procedure Act, as finally determining the matter in controversy by the common law judgment that the plaintiff take nothing by his writ.

It was said in argument that our judgment in this case only involved a question of costs, as there were other pleas on the record which offered a defence on the merits.

And we are called upon to give judgment upon exceptions to the replication, and also to the plea, as well as upon the demurrer to the rejoinder.

The replication appears to me to be also bad, in alleging that the agreement, which is alleged in the plea to have been an agreement that the sum of \$2000 then said to have been paid, was in fact a compromise of *all* claims, and so of that now sued on, is the release set forth in the replication releasing *a particular* action. If there were no other agreement than that recited in the release, the proper course would have been to take issue on the plea.

The replication appears to me to be open to the exception taken to it that it is in reality no answer to, or denial or confession or avoidance of, any of the matters alleged in the plea.

So likewise does the plea appear to me to be open to the exceptions taken to it.

It must be assumed upon exceptions to the plea that the note is a good valid note for value in the plaintiff's hands and the plea only alleges inferentially that this claim was intended to be compromised under the words *all* claims, but there is nothing suggested to throw any doubt upon the plaintiff's right to recover in this action, or to call for a compromise of it, nor indeed does the plea suggest a doubt as to the plaintiff's right to recover in the action formerly sued upon. All that is alleged is that the defendants pleaded that their testator did not make the note.

So that the plea, standing by itself, amounts to no more than an assertion that in a former action brought by plaintiff against defendants as executors, the defendants, without any assertion that there was really any doubt existing as to plaintiff's right to recover, compromised and settled that suit, and inferentially this suit also, and all claims of the plaintiff against the estate of King, because they settled the former suit upon the assurance that the plaintiff had no other claim but the one formerly sued upon. For the reasons stated above when dealing with the rejoinder, I do not think that such a plea discloses facts

sufficient to bar absolutely the plaintiff's otherwise undisputed right to recover upon a promissory note, of which, for the purpose of this argument we must take him to be the payee for value.

Judgment *quod nil capiet* would not do complete justice between the parties, taking the facts to be as stated by defendants in their plea.

Our judgment will be for the plaintiff on the demurrer to the rejoinder, for the defendants on the exception to the replication, and for the plaintiff on the exceptions to the plea.

HAGARTY, C. J., and GALT, J., concurred.

Judgment accordingly.

MCCARTHY V. VINE.

Agreement—Parol evidence—Payable to my order—Meaning of.

In an action on an agreement, by which—in consideration of the plaintiff giving defendant his promissory note for \$438, payable four months after date, as the purchase money for a note for \$730 made by T. & Son, having then ten months to run, payable to defendant's order—defendant agreed to keep the plaintiff's note renewed until the maturing of T. & Son's note; and at the maturity of T. & Son's note, "to procure the said T. & Son to renew their said \$730 note, by giving their seven promissory notes for equal amounts *payable to my order*, and payable in one, two, and three months," &c.:

Held, that the words "payable to my order" did not necessarily import an unconditional endorsement by defendant of the seven notes, but might mean only such an endorsement as would pass the property in them to the plaintiff: that evidence of conversations between the parties before making the agreement, and of the surrounding circumstances, was therefore admissible to shew its true meaning; and it appearing that the note for \$730, also payable to defendant's order, was endorsed by defendant "without recourse," and that the plaintiff designedly left the agreement doubtful, so as to insist upon an unconditional endorsement as to the others: *Held*, that he could claim only that these notes should be endorsed as the first one was.

THIS was an action on an agreement under seal, dated 8th August, 1871, which agreement was in the following terms: "In consideration of Peter McCarthy, of St.

Catharines, giving me his promissory note for the sum of \$438, payable four months after the date thereof, as the purchase money for a promissory note of \$730, made by Beverley Tucker & Son, dated 8th June, 1871, payable in twelve months from its date, to my order, at the Quebec Bank here, I hereby agree to keep the said promissory note of P. McCarthy renewed until the maturing of the said Tucker note; and for the consideration aforesaid I do also agree, at the maturing of the said Tucker note, to procure the said Beverley Tucker & Son to renew their said \$730 note, by giving their seven promissory notes for equal amounts payable to my order, and payable in one, two, and three months, but any of them not longer than four months."

The declaration contained two counts on this agreement, the breach assigned in the first count being that the defendant did not keep the said note for \$438 renewed until the maturity of the Tucker note.

The pleas to this count were, 1. *Non est factum*. 2. Performance.

The second count was as follows: And also for that the defendant on the 11th August, 1871, by his deed covenanted with the plaintiff that,—in consideration that the plaintiff would give to the defendant his promissory note for the sum of \$438, payable four months after the date thereof, as the consideration for a promissory note for \$730, made by Beverley Tucker & Son, dated 8th June, 1871, payable twelve months after the date thereof—he, the defendant, would at the maturity of the said promissory note made by the said Beverley Tucker & Son, procure the said Beverley Tucker & Son to renew their said note by giving their seven promissory notes for equal amounts, payable to the order of the defendant, in one, two, and three months, but not at longer dates than four months, from the date thereof, and would endorse the same to the plaintiff. The breach was then alleged, that the defendant did not so procure the said renewal notes and endorse the same to plaintiff.

To this count defendant pleaded, 1. *Non est factum*.

2. That the said agreement in that count mentioned, was an agreement for the sale of a promissory note which the defendant endorsed without recourse to the plaintiff, and that the agreement on his part to procure the said seven promissory notes of the said Tucker & Son contained no promise or agreement that he would endorse the same to the plaintiff, as in the second count alleged. And the defendant says, that he did procure the said seven promissory notes of the said Beverley Tucker & Son, payable to the order of the defendant, and did offer to endorse the same without recourse, and deliver the same to the plaintiff in performance of his said agreement. And so the defendant says that he did perform so much of the said agreement as related to the procuring by him of the said seven promissory notes, and that he has offered and has always been ready and willing to perform the residue of the said agreement, but the plaintiff would not accept the said notes so endorsed as aforesaid.

Issue was joined upon these pleas.

The case was tried before Wilson, J., and a jury, at St. Catharines, in the Fall of 1872.

The evidence given by the plaintiff was as follows :

This agreement is in my handwriting. I read it to defendant before execution. Tucker's note, at the time of the agreement, had ten months to run. I never received the seven notes in lieu of the \$730 note. They were tendered to me by one of the Messrs. Miller without any endorsement on them at all ; they were payable to defendant's order. I refused them without the endorsement of defendant. Mr. James Miller afterwards asked me if I would accept the seven notes if they were endorsed by defendant without recourse. Mr. Miller had not the notes with him, but I agreed to consider that as a tender of the seven notes endorsed without recourse. I refused to receive the notes endorsed without recourse ; I wanted the notes endorsed not in that limited form.

Cross-examined—I am a barrister and a practising lawyer, have been so for five years ; defendant is a

butcher ; have known him a good many years. I know Tucker & Son, they had the Stevenson House. I had other transactions with defendant by which I purchased from him other notes he had against Tucker & Son previous to 11th August, 1871. I have received payment of part of these notes. Defendant came to my office about this note of \$730. Defendant spoke to me first on the market about it, about a week before the 11th August: he came to me on 11th August. I again refused to take the note. Before he left the office I agreed with him to take it. We came to the agreement in question. That note was dated on the 8th June, 1871, at twelve months, and I was to give my note to defendant for \$438, which he was to keep renewed till Tucker's note became due. Tucker's note was payable to defendant or order. I do not think defendant had endorsed that note when he came to my office. I don't remember asking him to endorse that note : he did endorse it in my office I think : he endorsed it without recourse. The words "without recourse" were added in my handwriting. It was understood that defendant was to endorse that note. The agreement was, that I was to purchase the note for \$730, endorsed by him without recourse, for my note for \$438. I can't say whether defendant or I first spoke of the limited endorsement ; no one was present but he and I. I had not handed my note for \$438 to defendant before the agreement was signed. I drew the agreement intentionally to make defendant endorse without restriction the seven notes to be thereafter given. I considered the words "or order," to be in the seven notes, implied they were to be endorsed by him to me; that is the reason the words, "and to be endorsed by him," were not in the agreement. Defendant agreed with me to endorse the notes; nothing was said of "unconditionally." I refused to buy the large note at all, on the ground that Tucker & Son would not be carrying on business here in 1872, and it would be impossible to make anything out of the \$730 note when it fell due. Defendant said, he was satisfied they will be here doing business, and in a better position than they had been : that he was not afraid to guarantee the pay-

ment of the seven notes. I believe the legal effect of the agreement is as I have stated it to be. I have not submitted to counsel the question, whether defendant was bound to endorse the seven notes unconditionally or not. I omitted to insert the words, to be endorsed by him to me. Defendant is a pretty keen man.

On his re-examination, he stated: the words "without recourse" on the note for \$730 were suggested to be put on by the defendant. He did not ask me to put the words "without recourse" in the agreement.

Miller, for defendant, then moved for a nonsuit because no such deed as set out had been proved; there was no such agreement as that defendant would endorse the seven notes.

The learned Judge overruled the objection, and the case proceeded.

It was left to the jury to say whether, from the surrounding facts and circumstances, it was the agreement that defendant should endorse the seven notes in an unlimited and unrestricted manner, or merely in the qualified manner as the original endorsation was.

The jury found a verdict for the defendant.

During Michaelmas Term *Harrison*, Q. C., obtained a rule calling upon the defendant to shew cause why the verdict should not be set aside and a new trial had, for misdirection of the learned Judge in receiving parol evidence to control the covenant sued upon, and in submitting to the jury the question whether, from the surrounding facts and circumstances, it was the agreement between the parties that the defendant should endorse the seven notes in an unlimited and unrestricted manner, or merely in a qualified manner, without recourse, instead of himself interpreting the covenant sued upon, and ruling that according to its legal effect defendant was bound not only to endorse the seven notes, but, in the absence of provision to the contrary in the covenant, was bound to endorse them in the ordinary manner; or why the said verdict should not be set aside, and a new trial had between the parties, on the ground that the said verdict, as to the issues found to

both counts of declaration, is against law, evidence, and the weight of evidence.

In the same term, *Miller*, shewed cause, citing *Taylor* on Evidence, 6th ed., p. 1061.

Harrison, Q. C., contra, cited *Marzetti v. Williams*, 1 B. & Ad. 423; *Mayne* on Damages, 2nd ed., ch. 1; *Abrey v. Cruz* L. R. 5 C. P. 37; *O'Neil v. Lingham et al.*, 9 C. P. 14; *Albert v. The Grosvenor Investment Company, Limited*, L. R. 3 Q. B. 123, 128; *Malott v. Carscadden*, 31 U. C. R. 363, 366; *Ireson v. Mason*, 12 C. P. 475; *Chadwick v. The Mayor, &c., of Burnley*, 12 W. R. 1077; *Innes v. Munro*, 1 Ex. 473.

GALT, J.—I shall dispose of the issue on the first count by stating that in my opinion the question was one entirely for the jury, and that I see no reason to doubt the correctness of their finding.

With reference to the second count. The agreement on which this action is brought, was a deed poll drawn by the plaintiff, and executed by the defendant at his request. It differs from the agreement set out in the second count in several respects. First, the agreement states the note for \$438, "as the purchase money for a promissory note," &c., payable," &c., "to my order;" whereas the count states it to be "as the consideration of a promissory note," and omits altogether the statement that it was payable to defendant's order; and by adding the words, "and would endorse the same to the plaintiff."

I think there can be no doubt that the agreement meant that the seven notes should be endorsed by the defendant so as to pass the property in them to the plaintiff, for the reason that they were to represent the \$730 note purchased from him, and consequently that it was agreed between them that he should do what was necessary to have that effect; but the evidence of the plaintiff himself satisfies me that he knew, when he drew the agreement and handed it for execution to the defendant, that the defendant never would have executed it had he been aware of what, I regret to say, appears to have been a trick on the part of the plaintiff.

The declaration contains an allegation that by the terms of the agreement the defendant agreed to "endorse the notes to the plaintiff." This is not sustained by the instrument, but the plaintiff contends that such is the legal effect of the agreement; and I agree that it is so; but it by no means follows that the defendant agreed to endorse the notes in such form as to render himself responsible for their due payment. There is nothing on the face of the instrument to shew that that was the arrangement.

It is quite true that if we confine our attention to the declaration—which states that the \$438 note was given "as the consideration for a promissory note made by Beverley Tucker & Son, dated 8th June, 1871, payable twelve months after the date thereof," and is silent as to the fact that that note was payable to defendant's order, as is set out in the agreement—we might arrive at that conclusion; but when we find in the agreement that the note for \$730 was payable to defendant's order, and that the seven notes to be thereafter taken from Beverley Tucker & Son were to be made payable to the defendant's order, it is right that we should see what effect had been already attributed to those words in the original transaction, and in that case the endorsement claimed by the plaintiff and made by the defendant was an endorsement without recourse. In my opinion we are then called upon to say that the agreement was that the same effect should be given to the words "payable to my order" in the one instance as in the other (*a*).

The plaintiff's own testimony shews that he *intentionally* omitted the words "and would endorse the same," and we can arrive at no other conclusion than this, namely, that as he designedly left the expression doubtful he had no right to insist on more than that the seven notes should be endorsed to him in such a manner as would transfer the property in the same way as the \$730 note had been endorsed, and has no claim on the defendant for an unconditional endorsement.

(*a*) See *Forbes v. Watt*, L. R. 2 Sc. & D. App. 216, per Lord Colonsay.

The written contract merely states that the notes are to be payable to defendant's order. It is literally fulfilled without his becoming responsible by endorsing them. In many written dealings between parties it would probably be presumed from the context and the nature of the bargain that such words involved an endorsement and a liability, but they do not necessarily mean so, and can be fulfilled by an endorsement simply to give a right of action to the transferee.

I think that, as the agreement is silent as to the endorsement, we have a right to consider the parol testimony in order to ascertain what was the intention of the defendant at the time he executed the agreement; and if so, I gather from the plaintiff's own evidence that all the defendant ever agreed to do was to endorse the substituted notes in the same manner as he had endorsed the original note.

HAGARTY, C. J.—I agree in the result arrived at by my brother Galt. Some difficulty might arise on the pleadings, but the broad question involved was argued without reference thereto.

The agreement to give the plaintiff the notes of a third person "payable to my order" does not, I think, absolutely and necessarily, by the mere force of the words, import that the promisor must endorse so as to make himself responsible.

I therefore think that evidence of the circumstances, and of the true intent and meaning of the parties, was admissible.

There are a number of cases bearing on the general question: *Lindley v. Lacey*, (17 C. B. N. S. 578).

In *Newell v. Radford*, (L. R. 3 C. P. 54,) *Bovill, J.*, says "But it has always been held that you may prove what the parties would have understood to be the meaning of the words used in the memorandum, and that for this purpose parol evidence of the surrounding circumstances is admissible, and the cases of *Macdonald v. Longbottom* (1 E. & E. 977), and *Spicer v. Cooper* (1 Q. B. 424,) are authorities to that effect."

In *Macdonald v. Longbottom* (1 E. & E. 983), Lord Campbell says, "I am of opinion that, where there is a contract for the sale of a specific subject-matter, oral evidence may be received, for the purpose of shewing what that subject-matter was, of every fact within the knowledge of the parties before and at the time of the contract. * * There cannot be the slightest objection to the admission of evidence of this previous conversation, which neither alters nor adds to the written contract, but merely enables us to ascertain what was the subject-matter referred to therein."

In the case for judgment the question was, what was the subject matter of sale. A note or notes to be endorsed by defendant as a person responsible thereon, or merely the note or notes of a third person to defendant's order, to be transferred to the plaintiff in such a way as to enable him to sue for and collect the same?

I think the last case cited is in point.

GWYNNE, J.—The contention by the plaintiff is, that although not expressed in the agreement the necessary implication from what is expressed is, that defendant shall endorse; but I think that the nature of the transaction and the surrounding circumstances must be looked to, for the purpose of determining whether the endorsement by defendant upon the substituted paper shall be more extensive in its character than it was on the original note which was sold by defendant to plaintiff, and endorsed *without recourse*.

I think therefore the verdict should not be disturbed.

Rule discharged.

MERRICK ET AL. V. SHERWOOD.

Married woman—Liability on contracts—35 Vic. ch. 16—Construction of.

Held, that under 35 Vic. ch. 16, sec. 9, O., an action at law may be maintained against a married woman in respect of a debt incurred by her upon the faith of her separate estate before the passing of the Act. *Hagarty*, C. J., dissenting, on the ground that sec. 9 applies only to debts incurred after the passing of the Act.

Quære, as to the means of enforcing the judgment in such an action, where the separate estate consists of money to be paid into her hands by trustees.

This was a County Court case tried before Richards, C. J., and a jury, at Toronto, in the fall of 1872.

The declaration was on the common counts, for goods bargained and sold, goods sold and delivered, &c.

The defendant in person pleaded: 1. Never indebted. 2. That at the time of the contracting of the debt defendant was the wife of one L. P. S.

The plaintiffs joined issue on the first plea, and replied to the second, that the debt in the declaration mentioned was and is the separate debt of the defendant.

From the evidence given at the trial on behalf of the plaintiff, it appeared that in the year 1870, defendant, a married woman, possessed of a separate income under the will of her father, payable from time to time by the trustees thereof, went to the shop of the plaintiffs and ordered certain goods, which were given to her on her undertaking to pay for them herself, the plaintiffs refusing to trust her husband. The defendant at the time stated that she would pay for them in April, when she received her income. The account was opened in the books in defendant's name. The goods obtained at this time amounted to some \$50, and were paid for by the defendant. It appeared that after this, during the year 1871, the defendant again went to the plaintiffs' shop and ordered the goods sued for in this action, which were given to her on her undertaking, as before, to pay for them herself, and amounted to \$130 49cts. It was also proved that one of the plaintiffs was present when she purchased a good many of the things; that the account had been rendered several times, and that defendant had never made any objection to it.

At the close of the plaintiffs' case, the defendant's coun-

sel objected that no liability attached to the defendant under the Statute of Ontario, 35 Vic. ch. 16, as that Act was not retrospective in its operation, and the debt was contracted before the passing of the Act: that section 8 gave no power to contract; that the first clause of the statute was the only one on which she could be liable, and that applied only to contracts as to real estate: that it was not shewn that she had any real or personal property; also, that it was not respecting any business of hers or contract respecting real estate, and these were the only contracts she she could make; and therefore she was not liable: that no statement or promise made by her could make her liable for this kind of debt; and that there was nothing to shew that in contracting this bill she made any promise whatsoever.

The learned Chief Justice would not stop the case, but gave leave to defendant to move to enter a nonsuit, if upon any of the points raised he was entitled to it.

The case then proceeded. The defendant was called as a witness, and admitted the first account, and that she agreed to pay and had paid the same, but denied ever having promised to pay the second, asserting that she had ordered the goods on her husband's credit.

It was left to the jury to say whether the contract was made with defendant on her own account and in relation to her separate property, and if so, to find for the plaintiff, and they were told that the contract must be one which at the time it was made would bind the wife, and relieve the husband; or, if the husband were not relieved of the action brought against her, then to find for the defendant; that if the contract were made by the wife in relation to her own separate estate, the husband was relieved, and the wife could be sued in equity.

The counsel for defendant objected to the charge, that the jury should have been told that there was no evidence of any contract which would relieve the husband of his liability, and renewed all the objections taken at the close of the plaintiffs' case.

The jury found for the plaintiffs.

In Michaelmas term, *McMichael*, Q. C., moved on the leave reserved for a nonsuit, or for a new trial, on the ground that the verdict is contrary to law and evidence: that defendant, being a married woman, was not liable for debts not contracted with reference to her separate business, or for contracts that were not made respecting her real estate, and that the debts proved in evidence were not her separate debts or respecting her separate business; and on the ground that the claim in this action mentioned having accrued before the statute, that statute would not apply; and that there was no contract made by the defendant by which her husband could be relieved from his liability, and therefore she could not be sued separately; and that any promise made by the defendant not being regarding matters connected with her separate estate, was without consideration, and therefore no action would lie thereon: that on all these grounds there was misdirection; and that there was misdirection of the learned Judge in directing that the claim could be enforced in equity against the defendant as a married woman; and the learned Judge should have told the jury that the defendant was not liable.

G. Kerr, shewed cause, and cited *Add. Con.*, 6th ed., 760.

McMichael, Q. C., contra, cited *Morris v. Norfolk*, 1 Taunt. 212; *France v. White*, 1 M. & G. 731; *Marshall v. Rutton*, 8 T. R. 545; *Murray v. Barlee*, 3 My. & K. 209, 221; *Shattock v. Shattock*, L. R. 2 Eq. 182, 184.

GWYNNE, J.—For the purpose of our judgment in this case, we must take it as concluded by the verdict of the jury that, as was sworn on behalf of the plaintiffs, the goods sold and delivered to Mrs. Sherwood, the defendant, for which this action was brought, were so sold and delivered upon the express understanding that they should be paid for by herself out of her separate estate, and upon the faith and credit of that estate.

Proceeding upon this assumption, it becomes important to consider what the rights of the plaintiffs were in equity before the statute of Ontario, 35 Vic. ch. 16.

In *Murray v. Barlee* (3 My. & K. 209) Lord Chancellor *Brougham*, after reviewing the authorities up to that time, pronounces the doctrine of the Court to be, after much vibration of opinion, that it requires only to be satisfied that the married woman intended to deal with her separate estate, in order to make it liable for her engagements; when she appears to have done so, the Court holds her to have charged it, and will make her trustees answer the demand thus created; and this he pronounces to be the doctrine of the Court, although the married woman becomes indebted without executing any written instrument at all.

In *Owens v. Dickenson* (1 Cr. & Ph. 48), Lord *Cottenham*, adopting the language of Lord *Thurlow* in *Hulme v. Tenant* (1 B. C. C. 16), says, "The separate property of a married woman, being a creature of equity, it follows that if she has a power to deal with it, she has the other power incident to property in general: namely, the power of contracting debts to be paid out of it; and inasmuch as her creditors have not the means at law of compelling payment of those debts, a Court of Equity takes upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property, as the only means by which they can be satisfied."

But the judgment of Lord Justice *Turner* in *Johnson v. Gallagher* (3 DeG. F. & J. 494, also reported in 7 Jur. N. S. 273), wherein he reviews all the authorities upon this subject, is now regarded as establishing the doctrine of the Court upon a firm basis. It is the touchstone to which all cases upon this subject must now be brought. He there says, page 510, "It has not, so far as I am aware, ever been disputed that married women may encumber their separate estates by mortgage or charge." And with reference to the disputed point, whether the separate estates of married women are liable for their general engagements, such as tradesmen's bills, and claims of that description, he says, "Looking at this question without reference to authorities, it is difficult to see upon what ground debts of this class

can be distinguished from debts of the class to which I have last referred, what distinction there can, for this purpose be between debts by specialty and debts by simple contract, and still more, what distinction there can be between simple contract debts of different descriptions; and if no sound distinction can be drawn between the different classes of debts, the authorities which apply to the one class must, as it should seem, govern the other." He then reviews the authorities, and comes to the conclusion that the separate estate of a married woman is liable to her general engagements; but he adds, "I am not prepared, however, to go the length of saying that the separate estate will, *in all cases*, be affected by a *mere* general engagement." And referring to *Jones v. Harris*, (9 Ves. 493), and *Aguiar v. Aguiar*, (5 Madd. 414), he says, "It seems to follow, that to affect the separate estate there must be something more than the mere obligation which the law would create in the case of a single woman. What that something more may be, must, I think, depend in each case upon the circumstances. What might affect the separate estate in the case of a married woman living separate from her husband, might not, as I apprehend, affect it in the case of a married woman living with her husband. What might bind the separate estate, if the credit be given to the married woman, would not, as I conceive, bind it if the credit be not so given. The very term '*general engagement*,' when applied to a married woman, seems to import something more than mere contract, for neither in law nor in equity can a married woman be bound by contract merely." And he concludes by saying, "According to the best opinion which I can form of a question of so much difficulty, I think that, in order to bind the separate estate by a general engagement, it should appear that the engagement was made with reference to, and upon the faith or credit of, that estate, and that whether it was so or not is a question to be judged of by this Court upon all the circumstances of the case."

The Master of the Rolls, it is true, in *Shattock v. Shat-*

tock, (L. R. 2 Eq. 182,) disputes the accuracy of the conclusion arrived at by Lord Justice Turner in the above case as to the liability of the married woman's separate estate to "general engagements;" but in so far as the case before us is concerned, the doctrine as stated by the Master of the Rolls leads to the same conclusion as that of the Lord Justice. At page 188, the Master of the Rolls says, "The principle of the Courts of Equity relating to this subject" (the liability of a married woman in respect of her separate estate) "in my opinion is, that as regards her separate estate a married woman is a *feme sole*, and can act as such; but only so far as is consistent with the other principle, namely, that a married woman cannot enter into a contract. These principles are reconciled in this way: Equity attaches to the separate estate of the married woman a quality incidental to that property, namely, a capacity of being disposed of by her; in other words, it gives her a power of dealing with that property as she may think fit; but the power of disposition is confined to that property, and the property must be the subject matter that she deals with; *and, therefore, if she makes a contract, the contract is nothing unless it has reference, directly or indirectly, to that property.* This is, in my opinion, the extent of the doctrine of equity relating to the separate estate of a married woman. It is on this principle that every bond, promissory note, *and promise to pay*, given by a married woman, has, for the reason I have already stated, been held to be a charge made by her on her separate estate; that is to say, it is a disposal of so much of her property, the whole of which, if she pleased, she might give away. But if equity goes beyond this, it appears to me that it is laying down this principle, that where a married woman has separate estate, she may bind herself by contract exactly as if a *feme sole*; or, in other words, that the possession of separate property takes away the distinction between a *feme covert* and a *feme sole*, and makes them equally able to contract debts."

In *Mrs. Matthewman's* case, (L. R. 3 Eq. 781), Kinder-

sley, V. C., held that a married woman having separate estate, and who had contracted to take shares in her own name in a Joint Stock Company, was liable to be placed on the list of contributors, so as to bind her separate estate. He adopts to the fullest extent the doctrine as laid down by Lord Justice Turner, in *Johnson v. Gallagher*, (3 DeG. F. & J. 494.) He says, at page 786, "What is the law as to the extent to which a married woman may contract obligations, engagements, or debts, which the party with whom she is contracting may insist shall be paid out of her separate estate? That is a moot question; but I think the principle laid down by Lord Justice Turner, in *Johnson v. Gallagher*, (3 DeG. F. & J. 494,) is a sound one, and that it is the principle which the Court ought to adopt. As I understand that principle, it is this:—If a married woman, having separate property, enters into a pecuniary engagement, whether by ordering goods or otherwise, which (if she were a *feme sole*), would constitute her a debtor, and in entering into such engagement, she purports to contract, not for her husband, but for herself, and on the credit of her separate estate, and it was so intended by her, and so understood by the person with whom she is contracting, that constitutes an obligation for which the person with whom she contracts has the right to make her separate estate liable; and the question, whether the obligation was contracted in the manner I have mentioned, must depend upon the facts and circumstances of each particular case. It clearly is not necessary," he goes on to say, "that the contract should be in writing, * * nor is it necessary that there should be any express reference made to the fact of there being such separate estate. * * If the circumstances are such as to lead to the conclusion that she was contracting, not for her husband, but for herself, in respect of her separate estate, that separate estate will be liable to satisfy the obligation."

In *Butler v. Cumpston*, (L. R. 7 Eq. 16,) Malins, V. C., followed the decision in *Mrs. Matthewman's case*, and expressed his entire concurrence in it, and in the whole doctrine as laid down by Lord Justice Turner.

In *Woodward v. Woodward*, (9 Jur. N. S. 882,) it was held that a married woman may, in Equity, sue her husband to recover a loan made to him by her out of her separate estate. Lord Chancellor Westbury there says, "Wisely or unwisely, this court has firmly established the independent personality of a *feme covert* with respect to property settled to her separate use. It is a remarkable instance of legislation by judicial decision."

But in a recent case before Lord Chancellor Hatherly, and the Lord Justice Giffard in 1869, *Picard v. Hine*, (L. R. 5 Ch. App. 274,) the doctrine laid down by Lord Justice Turner is recognized as the established doctrine of the Court. Lord Hatherley there says, "We both think it very desirable that the position of a married woman who contracts as if she were a *feme sole* should be placed upon a well understood basis; and we think that that has been done by Lord Justice Turner in his judgment in *Johnson v. Gallagher*, (3 DeG. F. & J. 494.) There has been much discussion," he says, "as to the precise mode in which a married woman's estate could be affected by anything except actual disposition. It was strongly felt by the Court that there was great injustice in protecting a married woman, and allowing her to deprive others of their property, by entering into engagements which she must have known herself unable to fulfil in any other way than out of her separate estate, though the Court seems to have felt some difficulties as to the manner in which the separate estate could be reached. At one time it was held that an appointment would be inferred, but Lord Cottenham in *Owens v. Dickenson*, (1 Cr. & Ph. 48,) disposed of that by saying, that if so, the creditors must take in the order of the appointments. All these theories have been given up, and the doctrine has been placed upon a sound foundation by the decision in *Johnson v. Gallagher*, (3 DeG. F. & J. 494)." And he adds, "When she" (a married woman), "by entering into an agreement allows the supposition to be made that she intends to perform the agreement out of her property, *she creates a debt* which may be recovered, not by reaching her, but by reaching her property."

And Lord Justice Giffard says, "As to the law of this case it is unnecessary to say anything, because in the judgment of the Lord Justice Turner in *Johnson v. Gallagher*, (3 DeG. F. & J. 494); everything relating to the subject is clearly laid down, and it amounts in substance to this: that a creditor having a claim against a married woman can come here and assert and enforce an equity as against her separate estate."

The undoubted law, then, independently of any statute, is, that where goods are sold and delivered by a tradesman to a married woman upon her express promise to pay out of her separate estate, and upon the faith and credit of that estate, the vendor becomes *her* creditor, and she alone, and not her husband, the debtor; the transaction creates *a debt* due by the married woman alone, although it was enforceable in equity only, and only against the separate estate.

It will be convenient, now, before putting a construction upon the Statute 35 Vic. ch. 16, to consider what was the status and condition of a married woman, and what were her rights and liabilities by the laws of this Province, at the time that Act was passed.

By 22 Vic. ch. 34, Consol. Stat. U.C., ch. 73, it was enacted that every woman married, since the 4th of May, 1859, without a marriage contract, should hold and enjoy all her real and personal property, whether belonging to her before or acquired after marriage, free from the debts, obligations, control, and disposition of her husband, without her consent, in as full and ample a manner as if she continued sole and unmarried.

By the second section it was enacted, as to every woman who, on or before the said 4th day of May, was married without any marriage contract, that she should have, hold, and enjoy all her real estate not then taken possession of by her husband, and all her personal property not then reduced into the possession of her husband, whether belonging to her before or acquired after marriage, free from all debts and obligations of her husband contracted after the said 4th day of May, and from his control or disposition without her consent, in as full and ample a manner as if she were sole and unmarried.

But by section three, it was provided that nothing in the Act contained should be construed to protect the property of a married woman from seizure and sale on an execution against her husband *for her torts*, but that in each case execution should *first be levied* on her separate property,

And by the fourth section, the husband's estate, as tenant by the curtesy in his wife's real estate, was expressly reserved to him.

Section six provided for married women, under the several circumstances therein mentioned, obtaining an order of protection, which being obtained, it was declared, should entitle her to have and enjoy all her earnings and those of her minor children, and any acquisitions therefrom, free from the debts and obligations of her husband, and from his control and disposition, in as full and ample a manner as if she continued sole and unmarried.

The fourteenth section enacted that every married woman having separate property, whether real or personal, not settled by any such ante-nuptial contract, should be liable upon any separate contract made or debt incurred by *her before marriage*, such marriage being since the said 4th day of May, 1859, to the extent and value of such separate property, in the same manner as if she were sole and unmarried.

The nineteenth section of the original Act, being the 18th of the Consolidated Act, pointed out how she could be proceeded against at law or in equity upon a contract made or debt incurred by her before marriage, and provided for the recovery of the judgment or decree out of her separate property only.

And the seventeenth section of the original Act, consolidated in ch. 24, sec. 3 of the Consolidated Acts, declared that a married woman should not be liable to arrest on mesne or final process.

It has been decided that this statute did not *enable* a married woman to contract so as to bind herself as a *feme covert* to a greater extent than she was able to do before the passing of the Act: *Kraemer v. Gless*, (10 C. P. 470).

And in *Wright v. Garden et ux.* (28 U.C. R. 209), although Mr. Justice Wilson delivered a strongly dissentient judgment, it was decided that the Act did not empower a married woman having separate real property to contract debts for its improvement, so as to make herself liable *individually* or jointly with her husband in an action at law.

And in *The Royal Canadian Bank v. Mitchell* (14 Grant 412), it was decided that the operation of the sixth section of 22 Vic. ch. 35, consolidated as section 15 ch. 85 Consol. Stat. U. C., was to prevent the real property of a married woman being applied, even in equity, to the satisfaction of her separate debts and engagements, at least during the life of her husband.

In this state of circumstances, the Stat. 35. Vic. ch. 16, was passed, framed apparently upon the Imperial Statute which is called "The Married Woman's Property Act, 1870," and assimilating the status of a married woman in all respects to that of a *feme sole*.

The first section declares that "The real estate of *any* married woman which is owned by her at the time of her marriage, or acquired in any manner during her coverture, and the rents, issues, and profits thereof respectively, shall without prejudice and subject to the trusts of any settlement affecting the same, be held and enjoyed by her for her separate use, free from any *estate* or claim of her husband during her lifetime, or as *tenant by the curtesy*, and her receipts alone shall be a discharge for any rents, issues and profits; and any married woman shall be liable on any contract made by her respecting her real estate, as if she were a *feme sole*."

The operation of this section, as it seems to me, is to *divest* the husband of all estate and interest in the real estate of his wife, otherwise than under the trusts of a settlement affecting the same, thereby leaving the absolute estate vested in the wife, subject to absolute liability at law and in equity in respect of any contract made by her touching her real estate, just as if she were a *feme sole*, thereby annexing absolute liability to absolute enjoyment.

The second section provides that all the personal estate of a married woman, without any order for protection, shall be held and enjoyed by her and disposed of without her husband's consent, as fully as if she were a *feme sole*.

By the third section *every* married woman (including those married before the passing of the Act), may insure her own life, and enjoy the policy to her separate use.

Section four gives her the benefit to her separate use of a policy of insurance effected by the husband on his own life, under certain circumstances.

Section five enables *every* married woman to become a stockholder in or member of any bank, insurance company, or any other incorporated company or association, as *fully and effectually* as if she were a *feme sole*; and declares that she shall enjoy the like rights as other stockholders or members.

Section six provides that she may make deposits in her own name in any bank, and withdraw the same upon her own cheque.

Section eight is the only section which is limited to marriages which shall take place after the passing of the Act. The reason of this is not very apparent, unless it be because it is a transcript of the twelfth section of the English Act of 1870. The first part of that section is limited to future marriages; and the effect seems to be to leave the liability of a husband married before the Act, for the debts of the wife incurred before her marriage, as it stood under the Consol. Stat. U. C., ch. 73, but to provide that in the case of future marriages no liability whatsoever shall attach upon the husband for the debts of his wife contracted before her marriage; but that she, individually, shall be liable to be sued therefor, and that her separate estate (if she have any), shall alone be liable to satisfy such debts; but the latter part of the section appears to apply to *all* married women, whether married before or after the passing of the Act: namely, that a husband shall not be *liable* for any debts of his wife in respect of any employment or business in which she is engaged, or in respect of any of her own contracts.

Now, no language could be more explicit, as it appears to me, than the first eight sections of this Act, for the purpose of shewing the intention of the Legislature to be to assimilate the status of a married woman identically to that of a *feme sole*.

In a recent case before the Master of the Rolls, *Sanger v. Sanger*, (L. R. 11 Eq. 470), it has been decided that since the passing of "The Married Woman's Property Act of 1870," the operation of the twelfth section, which is almost identical with the first part of the eighth section of our Act, 35 Vic. ch. 16, is to subject property settled to the separate use of a married woman *without power of anticipation*, to the satisfaction of a debt incurred by her before her marriage; and the reason given is, that as the liability of the husband is taken away, it was only just that the liability should be fastened on the whole of the property of the wife, even though settled upon her subject to a restraint on anticipation.

So likewise with respect to our Act, it may be said, that as the intention of the Act is plainly to assimilate the condition of a married woman to that of a *feme sole*, as affects her property, debts, contracts, engagements, or torts, the remedies incident to that status *in favor of creditors* should be co-extensive with the remedies given to the married woman against all persons indebted to her or with whom she may contract. Accordingly we find the ninth section of our statute introduced to give to the married woman, to whom by the other sections of the Act the status of a *feme sole* is given, the remedies incidental to such a status, and subjecting her to be sued or proceeded against separately from her husband in respect of any of her *separate debts*, engagements, contracts, or *torts*, as if she were unmarried.

It has been contended before us that these latter words are to be limited to debts and engagements incurred, contracts made, and torts committed after the passing of the Act. It was also contended that the statute only related to contracts specially mentioned in the Act: namely, in respect of the real estate of the married woman, or in

respect of any employment or business in which she is engaged on her behalf.

But the power to incur debts which should affect the separate property of a married woman, although the creation of the Courts of Equity, was, as I have shewn, well recognised; and in respect of such a debt, its essence consisting in this, that it was incurred in virtue of a credit given to the married woman upon the faith of her separate estate, and not to her husband, he was never liable. The statute therefore never contemplated *conferring* upon a married woman authority to do that which without the act she could effectually do; namely, affect her separate estate with a liability to satisfy debts incurred upon the faith and credit of that estate.

The ninth section of the Act, as it seems to me, is to be construed as simply giving the appropriate remedies both *to* and *against* a married woman, which it was but just and proper should exist in connection with her altered status under the Act. Coupled therefore with the remedies given *to* her for the recovery of the property by this *or any other Act* declared to be her separate property, including therefore retrospectively property accruing under sec. 6 of Consol. Stat. U. C., ch. 73, the section provides suitable remedies *against* her, *namely*, that she may be sued separately from her husband, as *if she were unmarried*, for her separate debts, engagements, contracts and torts; thereby enabling her to be sued at law as if she were sole in respect of a debt, whereas before the Act she could only have been sued in equity, and with respect to her torts to be sued alone, whereas before the Act she could only have been sued jointly with her husband.

The subject matter of this *action* is a separate debt or engagement of the defendant in respect of which this ninth section now says she may be sued at law as a *feme sole*.

I am of opinion therefore that the plaintiffs in this case are entitled to retain their verdict, although to obtain the fruits of it the Act may possibly prove to be defective,

for when the separate estate of a married woman consists of money paid from time to time into her hands by trustees or executors, it may still be necessary to go into equity, to enforce the judgment by decree personally against the trustees or executors through whose hands the money reaches the defendant.

It might perhaps have been desirable that the Act should have provided that it should appear on the declaration that the action is against a married woman, but the Act does not say so; it says that she may sue and be sued in her own name separately from her husband, as *if she were unmarried*. The object of the statute, as it seems to me, being to open *to her* and *against her* the Courts of Law more effectually than the Courts of Equity had ever been, for there her husband was always a party to the suit.

HAGARTY, C. J.—I agree that the defendant could enter into the contract proved in this case so as to bind her separate estate; my only doubt is, whether the late statute applies to any contracts entered into before its passing.

I am unable to agree with the rest of the Court that the ninth section is retrospective in its operation.

It seems to me that the right to sue in her own name “for wages, earnings, money, and property,” is only given for such wages, earnings, &c., as accrue after the passing of this Act. No order for protection is declared to be thereafter necessary.

But up to the passing of this Act, such earnings, &c., without any order for protection, would go to the husband, and I think it could hardly have been intended to alter the right of property in them, as such right stood at the passing of the Act.

When the clause proceeds to say that she may be “sued or proceeded against separately from her husband in respect of any of her separate debts, engagements, contracts, or torts, as if she were unmarried,” I think we must hold that the debts, engagements, &c., should be incurred after, and not before the passing of the Act.

Such is, in my judgment, the usual and safe rule in the construction of a statute which not merely alters the remedy, but the rights and interests of parties.

I, therefore, think the defendant is entitled to our judgment.

GALT, J., concurred in the judgment of Gwynne, J.

Rule discharged.

ROSE v. HOPE ET AL.

Fixtures—Separate mortgages on land and fixtures—Refiling chattel mortgage.

The owner of land upon which there are fixtures, such as machinery in a mill, has the right to sever the chattels from the realty; and therefore a chattel mortgage by him upon the fixtures was *Held* not to be prejudiced by his subsequent mortgage of the land.

The chattel mortgage was not refiled within the year, but within the year, the mortgagor having sold the fixtures, the purchaser gave the mortgagee a chattel mortgage of the same in substitution of the original mortgage, containing a recital of that mortgage, and of the sale of the fixtures to him subject thereto, and that he had obtained an extension of time on condition of giving this mortgage for the sum unpaid.

Held, that the omission to refile did not give the mortgagee of the land priority, for he could not be considered a "subsequent mortgagee in good faith for valuable consideration," within the statute; and that the prior severance of the fixtures continued down to the giving of the second mortgage, which carried it on by its recitals and legal effect.

Semble, that if the chattel mortgage were paid off, the mortgagee of the realty would then be entitled to the fixtures.

DECLARATION.—First count: trespass to land and removal of a boiler, machinery, &c. Second count; trespass to land, and removal of fixtures.

Pleas, by defendants Duncan McKenzie, Alexander McLeod, Joseph Likes, John Pilcher, Jacob Moshier, and John McFayden: 1. Not guilty.

2. Traverse of the plaintiff's title to the land.

3. That one W. Balfour was the freeholder, by deed made by D. McKenzie to him, and the defendants Adam Hope, Charles James Hope, and Robert Wemys being entitled to the possession and use of certain chattels on the land, the other defendants at their request took possession of and removed the goods, with the leave and license of Balfour.

4. That McKenzie was possessed of the goods, and did by a certain deed, dated 18th July, 1870, assign them to Hope et al. to secure a debt : that thereby Hope et al. were entitled to the possession, and the other defendants, at their request, &c., took possession, *quæ sunt eadem*, &c.

Pleas by defendants Hope et al : Not guilty. Leave and license. That the land and goods were not the plaintiff's. Issue.

The case was tried at Guelph, before Gwynne, J.

There was a mill on the land driven by steam power. The boiler was fixed in brick work ; the engine in frame work, screwed down on sills in the ground. It was removed by unscrewing the nuts. The defendants removed the articles, under the authority of Hope & Co. It did not appear that any unnecessary or serious damage was done in the removal.

The following deeds were put in evidence :

1. Chattel mortgage, dated 19th July, 1869. Richard and William Hartley to Adam Hope, securing \$600 on the property in question, payable in one year.

2. Mortgage, Richard and William Hartley to John McLaren, securing \$600 of the land on which the mill stands, and in which the chattel property now in dispute was placed.

3. Deed, dated 1st December, 1869, Richard and William Hartley to Duncan McKenzie, of the above land, and of all goods, chattels, machinery and buildings now used or situate on the said parcel of land, subject to the above mentioned mortgages.

4. Mortgage, Duncan McKenzie to John McLaren of the above mentioned land—consideration, \$600. Nothing was said of the goods, chattels, machinery, and buildings, &c. [This mortgage appeared to have been in substitution of the mortgage of the Hartleys above mentioned.]

5. Deed, Elliott et al. to McKenzie, of the land in question. [This deed conveyed the equity of redemption in the land to McKenzie.]

6. Assignment by John McLaren to Rose (the plaintiff) of mortgage No. 4.

7. Chattel mortgage, McKenzie to Adam Hope and others of the property covered by mortgage of 19th July, 1869, (No. 1), dated 18th July, 1870. [This mortgage was in substitution of mortgage No. 1.]

McKenzie, it appeared, was insolvent; and it was admitted that his assignee, Balfour, had assented, so far as he could, to defendants taking the things.

At the time of taking, the plaintiff was in possession through his agent.

It became a question of title, and it was left to the jury to assess the damages, (which they did at \$800) and the Court was to decide the legal questions raised on the leave reserved.

In Easter Term *McMichael* obtained a rule on the leave reserved to enter a verdict for defendants, or a nonsuit, or for a new trial for misdirection, in not directing that the defendants, Hope & Co., owned the chattels, and that no trespass was committed.

Anderson and *McLennan* shewed cause, and cited *Longbottom v. Berry*, L. R. 5 Q. B. 123, and cases there cited; *Paterson v. Pyper*, 20 C. P. 278.

McMichael, contra, cited *Burnside et al. v. Marcus*, 17 C. P. 430; *Hellawell v. Eastwood*, 6 Ex. 295; *The Great Western Railway Company v. Bain*, 15 C. P. 207; *Wiltshire v. Cottrell*, 1 E. & B. 674; *Sherboneau v. The Beaver Mutual Fire Assurance Association*, 30 U. C. R. 472; *Climie v. Wood*, L. R. 3 Ex. 257; S. C. L. R. 4 Ex. 328; *Walmsley v. Milne*, 7 C. B. N. S. 131; *Waterfall v. Penistone*, 6 E & B. 876.

HAGARTY, C. J., delivered the judgment of the Court.

The plaintiff's (Rose's) title rests altogether on the mortgage to John McLaren, first by the Hartleys to McLaren and afterwards by McKenzie to McLaren, apparently in substitution of the Hartley mortgage.

Before either of them, the Hartleys, being in possession as owners, had given to the defendant Adam Hope a bill of sale by way of mortgage on these chattels, the boiler,

engine, saw mill, machinery, belting, &c., on the land mentioned in the bill, payable in a year, to secure \$600.

After this they gave a mortgage to McLaren on the land, making no reference to any saw mill or machinery or chattels.

Afterwards the Hartleys sell to McKenzie both land and chattels, subject expressly to both the mortgages, and then McKenzie gives McLaren a mortgage on the land for \$600, as a substitution of that given by the Hartleys.

Then McLaren assigns his mortgage to the plaintiff Rose.

Many cases have settled the rule that, as between mortgagor and mortgagee, a mortgage of the land carries with it all things affixed thereto for the permanent use thereof to the bettering of the inheritance, and the rule is especially clear when there is a mill on the land; all machinery affixed to the freehold for the permanent use of the mill will pass, whether on the premises at the date of the mortgage or afterwards put there by the mortgagor, even though such fixtures might be removable as between landlord and tenant.

We had to consider this in *Paterson v. Pyper* (20 C. P. 278) where the cases are noticed. Since then the law has been reviewed, in the well argued case of *Holland v. Hodgson* (L. R. 7 C. P. 334), in the present year.

But I think it clear that the owner of the premises may first give a security on such fixtures and machinery, and that his subsequent mortgage of the land cannot prejudice the prior security.

Owner of both fixtures and land, he, as it were, severs them, one from the other, conveying them to different parties. I think he could equally give a valid security on them as lease the use of them for a term to a tenant.

In one of the cases, *Climie v. Wood*, in Error (L. R. 4 Ex. 330), Willes, J., delivering the judgment of the Court, quotes the language of Lord Cottenham (in *Fisher v. Dixon*, 12 Cl. & F. 312), "The individual who erected the machinery was the owner of the land and of the personal pro-

perty which he erected and employed in carrying on the works; he might have done what he liked with it; he might have disposed of the land; he might have disposed of the machinery; he might have separated them again."

It had been urged that it was necessary for the encouragement of trade that things like these should be considered personalty.

Lord Cottenham says to this, "It was therefore not at all necessary in order to encourage him to erect those new works, which are supposed to be beneficial to the public, that any rule of the kind should be established, because he was master of his own land. It was quite unnecessary, therefore, to seek to establish any such rule in favour of trade as applicable here, the whole being entirely under the control of the person who erected this machinery."

I think that the plaintiff cannot claim these chattels as affixed to the freehold so long as the prior conveyance of them as chattels exists.

The plaintiff contends that the chattel mortgage, Hartleys to defendants Hope & Co., is at an end, not being refiled within the year.

But within the year McKenzie, the assignee of the Hartleys, executes the chattel mortgage of the 18th July, 1870, reciting the mortgage by the Hartleys and the sale by them to him subject thereto, and that he had asked for an extension of time upon condition of giving the present security; then, for the consideration of \$500 still unpaid, he assigns the same chattels to secure payment at future days, and this was duly filed.

We see no reason why this should not be considered as a subsisting security. The simple re-filing within the year would not have answered the purpose of the new bargain. When new terms of payment, or otherwise, are arranged involving a fresh bargain about the chattels, the re-filing of a copy under the statute would not suffice.

The plaintiff will, however, contend that if the Hopes' title depend on the first chattel mortgage, it is void, not being re-filed; and if such title depend on the last chattel

mortgage, then it cannot avail against his prior mortgage of the realty, on the doctrine above admitted.

It is only against creditors and "subsequent purchasers, and mortgagees in good faith for valuable consideration," that the re-filing is necessary.

I think it quite clear that the prior severance of these fixtures as chattels created by the Hartleys, continued down to the giving of the second chattel mortgage by McKenzie, and that the latter instrument carries it on by its recitals and legal effect, and that nothing has occurred to let in the claim of the mortgagee of the realty to them as fixtures.

On the facts in evidence the plaintiff cannot, we think, be held, in the words of the statute, to be a purchaser or mortgagee in good faith for value. The mortgage debt of McLaren, his assignor, was only on the land from which the interest in these fixtures had been previously severed.

If the chattel mortgage debt had been paid off, released or extinguished, we may assume that the mortgagees of the realty would then be considered as entitled to such property, as the "severance" had ceased, and the things had re-assumed their original character of fixtures passing with the freehold.

Rule absolute for nonsuit.

NEVILL V. THE CORPORATION OF THE TOWNSHIP OF ROSS
ET AL.

Municipal corporations—Orders made at meeting of—Liability on—Pathmasters—Statute labor.

In trespass against a municipal corporation for the act of their pathmaster, in causing statute labor to be performed on certain land of the plaintiff, alleged by the defendants to be an original allowance for road, it appeared that the pathmaster acted under an order written by the clerk, by the direction of the council while in session.

Held sufficient to render the corporation liable, and that a by-law was not necessary.

Held also, following *Bross v. Huber*, 18 U. C. R. 282, that a notice of action stating that the action would be commenced in the *Court of Queen's Bench or Common Pleas*, was insufficient.

THIS was an action of trespass tried before Gwynne, J., at Pembroke, brought against the Corporation of the Township of Ross for ordering the defendant McFeeters,

who was pathmaster, to cause the statute labor in his division to be performed on the fifth concession road, between Gould's Road and lots 20 and 21, and against the defendant McFeeters for acting under the said order.

From the evidence it appeared that a dispute existed between the corporation and the plaintiff and others as to the existence of a concession road between the fifth and sixth concessions. It appeared also that the plaintiff was in possession of lot 25 in the sixth concession and the east half of lot 25 in the fifth concession, and had been in actual occupation for nineteen years, and that the place where it was stated the road allowance existed was actually fenced in, and that no road had ever been opened between these lots.

The clerk of the defendants was called, and stated that defendant McFeeters was pathmaster for 1871; that at a time when the council was in session he came before them and stated that he did not wish to do statute labor at this place without some authority. Upon this the witness was directed to write the following order, addressed to McFeeters as pathmaster:—

“SIR,—By order of the council of Ross you are ordered and required, as pathmaster, to cause the labor in your road division to be performed on the fifth concession road, between Gould's Road and lots 20 and 21.

“By order of the council.

“T. ELLIOTT, *Township Clerk.*”

Acting under this authority McFeeters committed the trespass complained of.

It appeared that previous to this, on the 6th of May, 1871, a resolution of the council of the township of Ross was passed in the following terms:—“Moved by D. E., and seconded by R. R., that the clerk be authorized to notify Thomas Nevill” (and others, naming them,) “and all whom it may concern, that they remove all fences from the concession line between the fifth and sixth concessions.—Carried.” But no by-law was ever passed.

At the trial the principal contest was as to the existence of any allowance for road between the fifth and sixth concessions, and a map shewing the position of the

property in dispute was produced at the trial, as well as the original field notes.

It also appeared that the notice of action served herein, stated that the action would be commenced in the *Court of Queen's Bench or Common Pleas*.

The learned Judge was of opinion that the defendants had failed to prove, as they had assumed to do, that any such allowance was provided for in the original survey, and he entered a verdict for the plaintiff with one shilling damages against the corporation; and entered a verdict for the defendant McFeeters, on the ground that the notice of action was insufficient, in not stating positively in what Court the plaintiff intended to bring his action.

In this Term *Osler* obtained a rule calling upon the plaintiff to shew cause why the verdict against the corporation should not be set aside, and a nonsuit or verdict for defendants entered, pursuant to leave reserved at the trial, and to the Law Reform Amendment Act, upon the grounds: that the corporation could not act except by by-law or resolution; that a mere oral direction by the individuals comprising the council to the clerk to instruct the pathmaster did not render the corporation liable to be sued in this action; that the instructions given by the council, so far as shewn, were such as they lawfully might give, and did not authorize any entry or trespass on the plaintiff's land; that there was, in fact, a road allowance between the fifth and sixth concessions of the township of Ross, as contended for by the corporation; and that the learned Judge who tried the cause should have so found; and that his finding a verdict against the corporation was, under the facts proved at the trial, erroneous, and against law, evidence, and the weight of evidence.

To this rule *Patterson*, Q. C., in the same term shewed cause, and cited *Add. Con.*, 6th ed., 699, 700, 701, and cases there cited.

Harrison, Q. C., contra, cited *Regina ex rel. Allemaing v. Zoeger*, 1 P. R. 219; *Thomas v. Wilson et al.*, 20 U.C.R. 331; *Reid v. The City of Hamilton*, 5 C. P. 269; *Croft v.*

The Town Council of Peterborough, 5 C. P. 35 ; *Regina v. Mayor of Stamford*, 6 Q. B. 433 ; *Grant Corporations*, 55, 56 ; *In re Snell and the Corporation of the Town of Belleville*, 30 U. C. R. 81 ; *The Municipal Council of East Nis-souri v. Horseman et al.*, 9 C. P. 189.

GALT, J., delivered the judgment of the Court.

A careful consideration of the evidence induces me to concur in the opinion of the learned Judge as respects the want of proof of the existence of any original allowance for road. The map produced at the trial, and an examination of the field notes, tend strongly to the same conclusion. It may be possible that if the original instructions for the survey were produced, and the evidence of the surveyor were given, it might be shewn to be otherwise ; and as respects the insufficiency of the notice this case is concluded by the case of *Bross v. Huber*, 18 U. C. R. 282.

It was contended on the part of the defendants that in the absence of a by-law the corporation could not be made liable, as the council could only act so as to bind the corporation by by-law—in other words, that the non-existence of a by-law relieved the corporation from all responsibility for acts done or directed by the Council.

In *Cross v. The Town Council of Peterborough*, 5 C. P. 35, Crooks, on behalf of the defendants, in shewing cause to a rule to set aside a nonsuit, took the objection in almost the same words as those in the rule before us : that defendants could not be made liable without a by-law ; and, if no by-law, that the remedy should be against the persons who did that which caused the injury to the plaintiff's close. This objection was not allowed to prevail, and the Court set aside the nonsuit. In giving judgment, Macaulay, C. J., says : " And I doubt not corporations may become liable as tort-feasors for things done by their direction without by-laws for which they would not have been so liable had such things been previously authorized thereby ; and that they might incur such liability even for acts done in pursuance of a by-law, where their power and jurisdiction were therein exceeded, and injury and damage inflicted under it."

The argument before us was rested on the ground set forth in the rule, namely, that the corporation could not be held responsible by the mere oral directions given by individuals composing the council to the clerk of the council to instruct the pathmaster, but in my opinion this is not a correct statement of the case as proved at the trial. The council were in session, and any instructions given to the clerk were given to him by the council. If we were to hold that no instructions could be given to the clerk to act except by by-law, we should, in my opinion, throw almost insuperable difficulties in the way of carrying on the business of these corporations. I do not think that the law is so unreasonable. In my opinion, the action taken by the council in directing the clerk to instruct their own pathmaster to expend the statute labor of his division in any particular locality therein, is sufficient to render the corporation liable.

In 1 Salkeld 191 it is laid down that "a corporation aggregate may appoint a bailiff to distrain without deed or warrant, as well as a cook or butler; for it neither vests nor divests any sort of interest in or out of the corporation." It appears to me that if a corporation may appoint a bailiff to distrain without deed or warrant, they certainly may instruct an officer already appointed to discharge what they may consider to be his duty, without going through the formality of passing a by-law.

Rule discharged.

BAIRD V. WILSON.

Public way—Action for obstruction—Special damage.

To maintain an action for obstructing a public way, the plaintiff must shew some substantial damage peculiar to himself, beyond that suffered by the rest of the public who use the way. The plaintiff here proved no such damage beyond being obliged, in common with every one else who attempted to use the way to pursue his journey by a less direct road. *Held*, following *Winterbottom v. Lord Derby*, L. R. 2 Ex. 316, that he had no right of action.

At the trial defendant raised no objection on the above ground, but denied the existence of the alleged highway, and the jury found in his favor. *Held*, that he might, nevertheless, support his verdict on this ground, it being admissible under not guilty.

THE declaration contained several counts, claiming that defendant obstructed a public highway to the plaintiff's prejudice, and also for obstructing a right of way which the plaintiff had over defendant's close,

The pleas were not guilty, and traversing all the rights claimed.

At the trial at Napanee, before Galt, J., the plaintiff proved that his residence was in the fourth concession, and defendant's land was directly opposite his in the fifth concession, the concession road being between them, and that the plaintiff also owned the lot next adjoining defendant's land on the east.

Almost opposite the plaintiff's house he claimed that there had been for fifty or sixty years a public road running through the defendant's land (not an original allowance) from the concession line to the regular travelled highway, which crossed defendant's land and also the plaintiff's second lot in the same concession as defendant lived in, and leads to Napanee.

The stoppage of the road complained of compelled the plaintiff to travel further, the width of a couple of lots, to reach the regular public highway.

The case was opened and wholly rested on the basis that for a long series of years the defendant and his predecessors had permitted the public without interruption to use this road at their pleasure, and the plaintiff also attempted to prove that statute labour had been done upon it.

The defence was a denial that such was the case, and that defendant had the right to close it up against plaintiff and the public.

No attempt was made to shew any mere right of way in the plaintiff over defendant's close.

No objection to the maintenance of the action by plaintiff as one of the public, was taken at the trial.

The jury found for defendant.

In Michaelmas Term *Reeve*, for the plaintiff, obtained a rule for a new trial on the ground that the verdict was

contrary to law and evidence, and that a user by the public and dedication were clearly proved.

Wallbridge, Q. C., shewed cause, and cited *Regina v. Rankin*, 16 U. C. R. 304; *Belford v. Haynes*, 7 U. C. R. 464.

Reeve, contra, cited *Moore v. The Corporation of the Township of Esquesing*, 21 C. P. 277; *Mytton v. Duck*, 26 U. C. R. 61.

HAGARTY, C. J., delivered the judgment of the Court.

On the argument it was suggested that the plaintiff could not maintain an action, and that the only remedy was by indictment.

This objection seems to be insurmountable.

The road claimed as a highway does not touch any portion of the plaintiff's land, and the only inconvenience he suffers beyond the general public is, that he may perhaps have a longer distance to go round, if going to Napanee or to the northern part of his other lot.

If he can recover damages, so can equally any inhabitant of a city or town, if a street not adjoining his premises, but connecting with the street in front or rear of him, be stopped up, involving his having to go round by some other street to reach a distant point.

The law is very clearly laid down in *Winterbottom v. Lord Derby*, L. R. 2 Ex. 316.

It was urged for the plaintiff that by the stoppage he was forced to go a round about way to his destination, and that he was thus damaged beyond the rest of the public. To which Kelly, C. B., replied, "But he is not damaged more than others of the public who may happen to pass along the way." * * * Upon the authorities, then, and especially relying on *Iveson v. Moore* (Lord Rayn. 486), and *Ricket v. Metropolitan Railway Company* (5 B. & S. 186, 34 L. J. Q. B. 257), I am of opinion that the true principle is, that he, and he only, can maintain an action for an obstruction who has sustained some damage peculiar to himself, his trade, or calling. A mere passer-by cannot do so, nor can a person who thinks fit to go and remove the obstruction.

To say that they could, would really in effect be to say that any of the Queen's subjects could."

There are several cases in which the general law is discussed, where compensation is sought from Railway Companies. The injury to individuals, apart from that of the general public, is widely discussed. I refer to *Ricket v. Metropolitan Railway Company* (L. R. 2 H. L. 175), *Beckett v. Midland Railway Company* (L. R. 3 C. P. 82), especially the exhaustive judgment of the late Mr. Justice Willes, p. 94. and to *McCarthy v. Metropolitan Board of Works* (L. R. 7 C. P. 508), decided within the last few months.

See also *Mayne on Damages*, 2nd Ed., 343.

Fisher v. Municipality of Vaughan (12 U. C. R. 55), decides that special damage must be both alleged and proved to give the plaintiff a right to sue individually for his share of the injury arising from a public nuisance.

The point is distinctly decided in *Jarvis v. Great Western Railway Co.* (8 C. P. 115), and against the plaintiff's claim.

I cannot distinguish this case from *Winterbottom v. Lord Derby* (L. R. 2 Ex. 316). The defendant, although he did not object at the trial, may now support his verdict on any ground; and he was entitled to succeed on the plea of not guilty.

Rule discharged.

DIAMOND V. CARTWRIGHT.

Practice—Arrest—Affidavit of debt.

An affidavit of debt whereon a Judge's order holding a defendant to bail was founded, stated simply "that the defendant is justly and truly indebted to me (the plaintiff) in the sum of \$259.90, for medicine, medical attendance, and services, and money lent, a detailed account of which I have some months ago delivered or caused to be delivered to him;" without averring either that the medicine was delivered, the medical attendance and services performed, or the money lent by the plaintiff to the defendant, or at his request.

Held, following *Handley v. Franchi*, L. R. 2 Ex. 34, affidavit insufficient. *Semble*, that the affidavit would be sufficient, without the words "at his request."

Quære, whether, on an application to set aside the arrest, affidavits can be received in shewing cause to support the original affidavit as to the cause of action.

IN Michaelmas Term *J. B. Read* obtained a rule in this case, calling on the plaintiff to shew cause why the Judge's

order to hold to bail, and the writ of *capias* and arrest, should not be set aside, with costs both of this application and of the application in Chambers to stay proceedings until Term, and the bail bond delivered up, on the ground of the insufficiency of the affidavit upon which the said Judge's order had been made.

The affidavit of the plaintiff, so far as regarded the statement of the debt between the parties, was as follows: "That defendant is justly and truly indebted to me in the sum of \$259.90 for medicine, medical attendance, and services, and money lent, a detailed account of which I have some months ago delivered or caused to be delivered to him, but he has never settled the same or any part thereof."

It did not state that all this was done by the plaintiff for the defendant, or at his request.

The rule also asked for the discharge of the defendant, upon affidavits shewing that defendant had no intention of leaving the country with intent to defraud his creditors, &c.

In the same Term *Hurd* shewed cause, and cited *Davies v. Muckle*, 3 U. C. L. J. 115.

He also filed several affidavits, which it is unnecessary to set out, as the judgment does not proceed upon them.

J. B. Read, contra, cited *Handley v. Franchi*, L. R. 2 Ex. 34; *Victors v. Davies*, 12 M. & W. 758; *Brown v. Garnier*, 6 Taunt. 389; *Berdoe v. Spittle*, 1 Ex. 175; *Fenton v. Ellis*, 6 Taunt. 191; *Cunliffe v. Maltass*. 7 C. B. 695, and cases cited in Arch. Prac. 12 ed. 745-6.

HAGARTY, C. J., delivered the judgment of the Court.

[After stating the affidavit as above,] It was objected that it was not stated that all this was done by plaintiff for defendant or at his request.

The case of *Handley v. Franchi*, (L. R. 2 Ex. 34;) is expressly in point, "the above named defendant is well and truly indebted to me in the sum of £182 2s., for money lent and goods sold and delivered (a).

(a) See *McDonnell v. Kelly*, 4 U. C. R. 394.

This was held insufficient. The motion was to deliver up the bail bond, and the plaintiff to pay to defendant the costs occasioned by the arrest and application; and the rule therefor was made absolute.

It seems impossible to distinguish this case from that.

The forms of pleading appended to our Common Law Procedure Act, all contain the words "by the plaintiff to the defendant."

We could get over the objection, I think, as to any request being necessary, although some of the forms, as for work and materials and money paid, contain the words (a).

Had the affidavits used in shewing cause been directed to the support of the original affidavit as to the statement of the cause of action, we should of course have had to consider whether such support would have been available.

No case has so expressly decided that we know of, and the point was merely suggested on the argument by my brother Gwynne in consequence of remarks made by judges in cases cited in *Damer et al v. Busby*, (5 P. R. 356.)

It is sufficient here to say that the subsequent affidavits are not drawn so as to raise such a question, even if the law allowed it to be done.

It is probable that defendant is also entitled to his discharge on the affidavits as to the leaving the country with intent, &c.

We make the same order as in the Exchequer; that the bail bond be given up to be cancelled, and defendant discharged from custody, and that the plaintiff do pay to defendant the costs occasioned by the arrest, and of the applications in Chambers and to this Court.

Rule accordingly.

(a) See *Ogilvie et al. v. Kelly*, 4 U. C. R. 393; *Hall v. Brush*, 3 & 4 Vic. R. & H. Dig. 48.

THE CANADIAN BANK OF COMMERCE V. ROSS.

Promissory note—Transfer by holder after maturity—Equities attaching.

The plaintiff sued as bearer of a promissory note made by defendant payable to one McL., or bearer. Defendant pleaded, on equitable grounds, that McL., being the holder of said note, deposited it with one McD. as collateral security for the payment by said McL. of a certain note of the said McL. then held by said McD., which said note McD. transferred and delivered to the plaintiffs, and deposited the note in the declaration mentioned with the plaintiffs after it became due as collateral security; and that the said McL. did, before the commencement of this suit, retire, pay, and satisfy his said note, and was and is entitled to a return of the note now sued on, so held by the plaintiffs as collateral security, and is the lawful holder of said note.

Held on demurrer plea bad for 1. The terms upon which the note was transferred to McD., which formed no part of the original consideration for which it was given, and to which the defendant was no party, did not constitute an equity attaching to the note in the plaintiffs' hands of which defendant could take advantage; and 2. That even if it were assumed that the plaintiffs had no better title than McD., still McD., being the holder at maturity, had a vested right of action against the defendant.

APPEAL from the County Court of the county of Middlesex, on a demurrer to defendant's second plea.

The declaration was on a promissory note made by defendant payable to one Alexander McLean, or bearer, whereof the plaintiffs are the holders.

Second plea, on equitable grounds, that one Alexander McLean, being the holder of the said promissory note, deposited the said note with one McDonald as collateral security for the payment by the said McLean of a certain note of the said McLean, then held by the said McDonald, which said note the said McDonald transferred and delivered to the plaintiffs, and deposited the said note in the declaration mentioned with the plaintiffs, after it became due, as collateral security. And defendant further says, that the said McLean did, before the commencement of this suit, retire, pay, and satisfy his said promissory note, and was and is entitled to a return of the note in the declaration mentioned so held by the plaintiffs as a collateral security, and is the lawful holder of the said promissory note.

To this plea the plaintiffs demurred on the grounds :—

1st. That the defendant cannot set up the *jus tertii* pleaded : 2. That the allegation that the plaintiffs hold the note sued on as collateral security, as set forth in the plea, shews right in the plaintiffs to recover, and its being transferred after it was due to the plaintiffs, as alleged, is no answer to the action.

The learned Judge decided in favor of the defendant on the demurrer, giving an elaborate judgment, and basing his decision on the following cases : *Collenridge v. Farquharson*, 1 Stark. 259; *Burrough v. Moss*, 10 B. & C. 558; *Parr v. Cambridge Union Guardians*, 10 C. B. N. S. 99; *Oulds v. Harrison*, 10 Ex. 572; *Holmes v. Kidd*, 3 H. & N. 891; *Lloyd v. Howard*, 15 A. & E. 990; *Emmett v. Tottenham*, 8 Ex. 884; *Agra and Mastermans Bank v. Leighton*, L. R. 2 Ex. 56; *Marston v. Allen*, 8 M. & W. 494; *Brown v. Mallett*, 5 C. B. 599.

From this judgment the plaintiffs appealed.

Becher, Q. C., for the appeal.

Robinson, Q. C., contra.

The authorities referred to are cited in the judgment.

GALT, J.—I have been careful in examining the cases referred to by the learned Judge, as I have the misfortune to differ from him in the result at which he has arrived.

The plea is, briefly, that the plaintiffs took the note sued on for value, after it was due, from McDonald, to whom McLean had delivered it as collateral security for the payment of a note discounted by him for McLean, and that McLean had subsequently paid his own note, and was, therefore, entitled to a return of the one now in question, and is, therefore, the lawful holder thereof.

It is unnecessary to cite cases for the purpose of shewing that if a party takes a note after maturity he takes it as a dishonored note, and is affected by all the equities between the original parties, whether he has notice of them or not.

This case, judging from the opinion of the learned Judge,

and the course of argument before us was considered as falling within that rule, and therefore that as the purpose for which the note had been transferred to McDonald had been satisfied, the defendant, who was no party to the transaction between McLean and McDonald, could set up as a defence to this action that the note belonged to McLean and that he was the lawful holder. In giving effect to this contention it appears to me that the learned Judge has misconceived the effect of the above well established doctrine.

From an examination of the authorities relied upon by him it will be found that in all cases where effect has been given to what may be called "the equities" attaching to a note, they were cases in which at the time of making the note or endorsing it some special arrangement was made affecting the parties to the note, and with reference to which the note was either made or transferred.

For example, take the case of *Holmes v. Kidd*, 3 H. & N. 891, in the Exchequer Chamber. There at the time when the bill was drawn and accepted, certain goods were deposited by the acceptor with the drawer to be sold and applied in payment of the bill. After the bill matured it was transferred to the plaintiff, and after such transfer the drawer sold the goods deposited with him as security. It was held, that as at the time the bill was drawn there was an agreement that the goods should be a security in the hands of the drawer, and if sold the proceeds should be applied in payment of the bill, if not paid by the defendant when due, and the drawer held the bill till it was overdue, when he endorsed it without value to the plaintiff, and afterwards sold the canvass, that the plaintiff took the bill subject to the equities affecting it, and that as in the hands of the drawer the right to sue was defeasible, the plaintiff took the bill subject to that contingency. Williams, J., says: "I agree that when it is said that an endorsee takes subject to equities, the equities must arise out of the original transaction. Here the encumbrance on the bill was part of the transaction out of which the bill

arose." Crompton, J., says, "Upon the concoction of this bill it was agreed that it was not to be paid if the canvass was sold. That agreement directly affects the bill, and was part of the consideration for it."

The case before us is of an entirely different description. At the time of making the note there was no agreement whatever affecting the note; it was simply a promissory note given by the defendant to his creditor, the only agreement being that he would pay it when due. This he neglected to do, and after the note was dishonored it was transferred without reference to him, by the person to whom he had given it.

In treating on this branch of the law of promissory notes Mr. Story says, at section 178, in his work on Promissory Notes: "If the transfer is after the maturity of the note the holder takes it as a dishonored note, and is affected by all the equities between the original parties, whether he has any notice or not. But when we speak of equities between the parties it is not to be understood by this expression that all sorts of equities existing between the parties from other independent transactions between them are intended, but only such equities as attach to the particular note, and as between those parties, would be available to control, qualify, or extinguish any rights arising thereon."

In the case before us there was no equity attaching on the note at the time it was made, nor were there any dealings between the parties to this suit in which the defendant was interested.

I am therefore of opinion that the judgment of the County Court is wrong, and that this appeal should be allowed.

HAGARTY, C. J.—We had occasion in *Grant v. Winstanley et al.*, 21 C. P. 257, to examine many of the cases as to the transfer of over-due notes.

It was there held on the authorities, that an express agreement upon the faith of which a note was made, not

to negotiate it after maturity, was an equity attaching to the note.

The latest English authority there cited, is *In re European Bank, Ex parte Oriental Commercial Bank*, L. R. 5, Ch. App. 358.

The Lord Justice Giffard there says, that the law as to equities attaching cannot be better stated than by Malins, V. C., in *Ex parte Swan, In re Overend, Gurney & Co.* L. R. 6 Eq. 359. There is an elaborate review of the law.

The Vice Chancellor Malins quotes Mr. Justice Cresswell's language, in *Sturtevant v. Ford*, 4 M. & G. 101, "that he takes the bill subject to all *its* equities," adding, "that is, the equities of the bill, not the equities of the parties."

He proceeds: "The indorsee of an over-due bill takes it subject to all the equities that attach to the bill itself, in the hands of the holder when it was due." He quotes Parke, B., in *Oulds v. Harrison*, 10 Ex. 572, 578: "It must be considered as entirely settled by the case of *Burrough v. Moss*, 10 B. & C. 558, that the indorsee of an over-due bill takes it subject to all the equities that attach to the bill itself in the hands of the holder when it was due, as, for instance, the payment or satisfaction of the bill itself to such holder, or where the title of such holder was only to secure the balance of an account due, as seems to have been the case in *Collenridge v. Farquharson*, 1 Stark, 259."

In this plea the plaintiffs, the Bank, took the note over-due as collateral security—therefore for value. For all that is stated in the plea, a right of action against defendant as maker vested in the Bank at once, and there could have been no defence whatever. *After* all this, the supposed matter of defence arises, such defence not being any reason why defendant should not pay his note generally, but that he ought to pay somebody else.

Now, it is clear to me, that where a defendant sets up, not that he ought not to pay any body, but that he ought to pay another than the plaintiff, his plea should shew that he is defending in privity with that other and with his assent, &c.

This point was fully discussed by us in *City Bank v. Smith*, 20 C. P. 98.

In the elaborate case of *Jones v. Broadhurst*, 9 C. B. 182, speaking of the position of an acceptor for value, Cresswell, J., delivering the judgment of the Court, says, "Having received value, it is difficult to discover any valid reason why he should be discharged from his liability to make the payment, which, for value, he has contracted to make, by reason of any arrangements between others to which he is no party, in which he is not shewn to have interfered, or his rights and liabilities are not shewn to have been in the contemplation of the parties to any such arrangements, and by which his interests are not in any respect compromised or affected." And at p. 178, "The interest of the acceptor is not liable to be affected by the state of accounts or equities between any other parties connected with the bill, and the only question in which he has any interest is, whether the party seeking to enforce payment by him is the legal owner of the bill; and whether recovery by and payment to such party will enure as a satisfaction and absolute discharge of his liability upon the bill."

This case did not turn on the question as to what are the *equities* on a bill or note, and was considered in *Cook v. Lister*, 13 C. B. N. S. 583-7, as having gone too far on other grounds.

In the latter case, page 587, William, J., says of *Jones v. Broadhurst*, 9 C. B. 182, "The principle on which the decision is founded, no doubt, was that, there being from the nature of the transaction a vested right of action in the holders against the acceptor, that right of action, according to the ordinary rule of law, could only be got rid of by a release or an accord and satisfaction. There must be the one or the other."

It certainly seems strange if the law be, that the Bank having a vested right of action against the maker of this note, that the happening of an event between two other parties to the instrument, not brought to the notice of the Bank when they acquired the note, and in no way bearing

on the maker's liability to pay his note to the holder, should divest such right of action.

I am of opinion that nothing is shewn by this plea to bar the right.

Were it simply a plea that the plaintiffs were not the holders, it of course would not be demurrable. But it relies on matters stated, which matters we think are no defence; and then it deduces therefrom the statement, not that plaintiffs are not the holders, but that McLean is the lawful holder.

I do not think the plea can be supported as a mere plea of not the holders. It would be a tender of an issue of a mere legal result from certain statements insufficient in themselves.

Even if we assume that the Bank had no better title than McDonald, there is the further difficulty, that the latter being the holder at maturity had a vested right of action against the maker. McDonald holding the note as security for the payment of McLean's note, was not bound to wait till the latter note became due, but could sue defendant at once. So this Court expressly decided in *Ross v. Tyson*, 19 C. P. 297.

In the case cited of the *European Bank, Ex parte Oriental Commercial Bank*, L. R. 5 Ch. App. 358, there are some expressions of Giffard, L. J., which at first sight might appear to be opposed to the doctrine as to the equities of a bill or note.

But, as he says, the acceptors of the bill in question, who only wanted to pay the right parties, were in the position of plaintiffs in an interpleader suit, and the other two banks were contesting the right to recover the proceeds of the bills. See also *Agra and Mastermans Bank v. Leighton*, L. R. 2 Ex. 56.

I have discussed the general law at greater length perhaps than the language of the pleading demurred to may call for; but the points are most important, and the learned Judge below has taken great care in preparing the judgment delivered by him.

GWYNNE, J.—It is quite consistent with anything alleged in the plea, that the note sued upon was due when McLean himself endorsed and transferred it to McDonald, and that McLean's own note to McDonald was overdue when the latter assigned the note sued on to the plaintiffs.

What I understand the plea to aver is, that McDonald having possession of the note sued upon and an interest therein, although such interest is alleged to have been limited, assigned, and transferred the note when overdue, and when the right to recover from the defendant was complete, to the plaintiffs as collateral security for moneys advanced to McDonald by the plaintiffs; and so in effect the plea admits that the plaintiffs received the note under circumstances which vested the interest and actual possession of the note in themselves for value, and under circumstances which at the very instant of transfer of the notes to the plaintiffs, rendered the defendant liable to them upon it, and that the note still remains due and unpaid by the defendant.

If this be the proper construction to put upon the plea, it does not seem to me to be necessary to refer to authorities to establish that it offers no bar at law or in equity to the plaintiffs' action.

Appeal allowed.

IANSON V. PAXTON.

Accommodation Endorsers—Right of contribution.

Where first and second indorsers on a note have, in fact, endorsed as mere sureties for the maker, the second not expressly stipulating for any right of recourse against the first, the first endorser, having paid the note, is entitled to contribution against the second; and it is immaterial that the first endorser did not endorse on the faith that there was to be another endorser, or that the second endorser believed that the first would be liable to him, and believed also that he, (the first endorser), was a partner with the maker.

Where one I. at the request of the plaintiff (the first endorser) took up the note, and the plaintiff afterwards repaid him. *Held*, that this was a payment by the plaintiff in discharge of the liability which he and defendant (the second endorser) had undertaken; and was sufficient to entitle him to recover.

Held, also, that the evidence, set out below, warranted the finding that the plaintiff did endorse merely as surety for the maker, and that I. paid the money for the plaintiff, intending to look to him for repayment.

DECLARATION on common counts for money paid, interest, and account stated.

Pleas.—Never indebted, and payment.

The case was tried before Richards, C. J., and a jury, at Toronto, in the fall of 1872.

The particulars of claim [were for money alleged to be payable by defendant to plaintiff, as a co-surety with him for one Andrew Paul, on a note for \$3,561, made by Paul payable to the plaintiff or order, and endorsed by the plaintiff.

Plaintiff claimed to have paid the note with interest and costs, and claimed one half of the amount from defendant.

The note was put in evidence; defendant was endorser after the plaintiff.

The plaintiff's case rested on his own evidence and that of Paul.

The latter was a miller, and seemed to have been much involved, and had had large dealings with the plaintiff, who had frequently endorsed notes for him. He had also obtained endorsements from defendant. A note for \$3,500, dated 31st of October, 1870, made by Paul to the plaintiff or order, and endorsed by him and defendant, was under protest. He, plaintiff, and defendant went to the Bank and got a renewal for three months, dated 9th December, 1870, for \$3,561, in the same form as the former.

Paul swore that at this time the plaintiff claimed he was only liable for half, and wanted defendant to endorse for that amount and he would pay it himself, and defendant to do the same. Defendant said no, he was not liable; that the plaintiff was bound to pay the whole. On this it was agreed they would endorse the note at three months, and leave the thing just as it was. He said defendant had recommended him to the Merchants Bank, but the manager said he would not take the plaintiff as endorser, but if defendant would endorse he would give Paul a credit of \$5,000. He then asked defendant to endorse, and told him the Bank did not know the plaintiff and would not let him have the money without his (defendant's) endorsement, and defendant knew it was not business paper. Defendant had been endorsing for Paul for six or seven years, and had many dealings, and plaintiff had a mortgage on Paul's property for previous debts to him.

The plaintiff swore that he and defendant had no conversation about endorsing for Paul; but that when they went all together to the Bank when the October note was under protest, he told defendant he knew they would have to pay it, and he, plaintiff, would pay his half at once if defendant would pay his; that defendant said he would not pay it, that he would renew, and that he thought Paul would get through if they gave him a chance: that he, plaintiff, only endorsed as a surety for Paul: that when he first endorsed for Paul, he took a mortgage to secure himself, which he had since foreclosed, but he had endorsed beyond the amount secured; that he did not know anything about defendant's endorsing the first note for \$3,500, but he thought when he first endorsed the note Paul told him he could get the money on it if defendant endorsed it, but he could not exactly swear this was so or not.

When the last note was taken up, the plaintiff's brother, James, went with him to the Bank to lift it. He told James that the latter would have both plaintiff and defendant for the money, and James paid the Bank and took up the note.

He afterwards sued plaintiff and defendant ; plaintiff did not defend, and for some reason the action against defendant failed, and after that the plaintiff paid his brother.

He denied having any interest in Paul's business.

Paul spoke to the same effect.

At the close of the plaintiff's case, a nonsuit was asked on the grounds : 1st. That there was no evidence that the money paid to the Bank was paid at the plaintiff's request. 2nd. That the plaintiff was not induced to endorse on the faith that defendant would endorse ; and that the remedy was in equity.

Leave was reserved to move for a nonsuit.

The defendant was examined : He said, these two notes were the first he endorsed ; that Paul came to him with the first note endorsed by plaintiff, and asked him to endorse, which he did on the faith of the plaintiff's name ; he then considered plaintiff well off, and he believed he and Paul were in partnership. When the last note was given, plaintiff wanted him to pay part ; defendant refused, saying he had endorsed on the plaintiff's responsibility ; and it was then arranged they should renew and remain as they stood before. He said that he put his name on, in the Bank, (to the first note, as would appear from the evidence), at Mr. Harper, the manager's request. He had previously recommended plaintiff to the Bank, as a man of means ; and he, the defendant, after some hesitation, put his name to it, thinking that if he refused, the manager would think he had over estimated the man's standing. He swore he had no interest whatever in the endorsement.

James Ianson swore that he took up the note with his own money, at the plaintiff's request, and afterwards sued both and failed against defendant ; that the plaintiff had made over considerable of his property to him.

Evidence was given to prove admissions of the plaintiff that he was in partnership with Paul, which was denied.

Paul being recalled, said that defendant endorsed the first note, not at the Bank, or at Harper's request, but at another place, when Paul brought it to him with plaintiff's

endorsement; that before this, Harper had asked him if defendant would endorse, and said that if he would, he, Harper, would let Paul have the money.

The motion for nonsuit was then renewed.

The learned Chief Justice asked the jury, if they were satisfied that the plaintiff became a party to the note as a mere surety, and not as a person having an interest in the transaction; if not a mere surety, they were directed to find for the defendant.

If plaintiff were a mere surety, then did defendant endorse as a mere surety for the accommodation of Paul and for his benefit, and at his request; if he did not endorse for Paul, and at his request, and for his benefit, but merely as a surety to the Bank, and not for the maker and at his request, to find for defendant.

If they should find this for the plaintiff, then did James pay this money to the Bank at plaintiff's request; was he paying this debt of his brother's without expecting his brother to repay him, and as a mere gratuitous payment on his part; that if he paid expecting to recover it all from his brother, if he could not from the other parties, then that would repel the idea of a voluntary payment, and if he could properly sue and recover from his brother the whole amount, then the brother could recover here: that as between the two brothers, if James paid it at the plaintiff's request, the law would imply repayment; he might have expected to recover the amount from all the others, but they not having requested him to pay, could not perhaps be liable for money paid to their use, but the plaintiff would be so liable; and if he was liable then he could sue for contribution.

Harrison, Q. C., objected to the charge, that the request to pay was not sufficient, unless the money was advanced on the credit of John alone: that if he paid the money at the plaintiff's request, expecting to realize the money from the parties to the note, the request would be immaterial, and the plaintiff would not be liable to him and defendant would not be liable to the plaintiff; and that what took place was an absolute discharge of defendant.

The jury found for the plaintiff for \$1962.24.

In this Term, *Harrison*, Q. C., obtained a rule on the leave reserved, and for misdirection, in ruling that, if plaintiff and defendant were accommodation endorsers, the action would lie, whether defendant knew the plaintiff was such endorser or not ; and that if James Ianson paid the note at the plaintiff's request, the action would lie, though the money was not paid on the plaintiff's credit, but to protect him against a suit, and in expectation that he, James, could sue the parties on the note, and so collect the amount ; or for a new trial on the law, evidence, and weight of evidence.

M. C. Cameron, Q. C., shewed cause, and cited *Clipperton v. Spettigue*, 15 Grant 269 ; *Cockburn v. Johnston*, 15 Grant 577 ; *Mitchell v. English*, 17 Grant 303 ; *Reynolds v. Wheeler*, 10 C. B. N. S. 561.

Harrison, Q. C., contra, cited *Dering v. Earl of Winchelsea*, 1 Cox 318, S. C. White & Tudor, L. C. 3rd ed., vol. I., 89, 95, 96 ; *Brittain v. Lloyd*, 14 M. & W. 762 ; *Turner v. Davies*, 2 Esp. 478 ; *Done v. Walley*, 2 Ex. 198.

HAGARTY, C. J., delivered the judgment of the Court.

The question involved in this case is of much practical importance.

It always seems to be a matter of regret, that the almost universal understanding and practice of the business public on matters of every day occurrence, should not be in accord with the rules of law.

It may be safely asserted, that there are very few persons in this country who endorse notes with one or more names prior to their own thereon, who would doubt for a moment their right to look to such names as responsible before their own for the full amount of the note, and that too whether they knew or did not know that the prior name or names had been put there, like their own, to accommodate the maker.

I am not aware that the question has been heretofore before any of our Common Law Courts in Canada.

In *Clipperton v. Spettigue*, 15 Grant 269; one Lanford was indebted to the Gore Bank. The Bank required security, [and S. & Co. and the defendant endorsed for his accommodation. At first S. & Co. alone endorsed, and renewed from time to time; then further security being required the plaintiff endorsed after S. & Co., and the note was again renewed; afterwards the plaintiff endorsed, and S. and Co. endorsed after him. All parties knew it was all done for Lanford's accommodation, but nothing was said by the endorsers as to primary liability among themselves. Plaintiff paid the amount, and filed a bill against S. & Co., for contribution.

Vankoughnet, C., held that he was entitled thereto; that there was no contract or understanding between them that the one should remain, or submit to be subject to his legal liability on the paper, without reference to their position as co-sureties; but on the contrary, that they incurred the mere naked liability as between themselves of co-sureties, without any contract to vary it. The case in this respect is different from the mere case of one endorser putting his name under that of another, without any knowledge of the circumstances under which the first endorsement was made.

Cockburn v. Johnston, 15 Grant 577, is to the same effect.

Vankoughnet, C., there says, "*Prima facie*, the first endorser is liable to the second. It may be shewn, however, that both endorsed as sureties for the maker; and if this be the simple case, then I apprehend that each must contribute his proportion of the liability."

In *Mitchell v. English*, 17 Grant, 304 Strong, V.C., says, "Nothing can be better settled than that co-sureties for the same debt are liable to mutual contribution, although they contract independently, and indeed without knowledge of each other. It is equally well established, that accommodation endorsers of a negotiable security are to be considered as co-sureties, irrespective of the order of their liability on the instrument itself."

He also held, that as the evidence shewed that the last endorser specially bargained when he endorsed that he should be liable only in default of the preceding parties, therefore he was not liable to contribute. But if the preceding endorser had endorsed on the strength of being able to claim contribution from the defendant, and the latter had notice thereof, he was inclined to think the defendant would have been bound by the prior endorser's equity.

The general law as to contribution is fully explained in the leading case of *Dering v. Earl of Winchelsea*, 1 Cox 318; S. C. *White & Tudor*, 3rd ed., vol. I., 89; and *Craythorne v. Swinburne*, 14 Ves. 160. The subject is discussed, and the principle fully adopted in a recent case of *Whiting v. Burke*, L. R. 10 Eq. 539; before Malins, V. C., affirmed on appeal, 6 Ch. App. 342. This was a strong case. The sureties had executed separate instruments at different times, and neither apparently with any reference to the other.

At law the case of *Reynolds v. Wheeler*, 10 C. B. N. S. 561, is strongly in favour of plaintiff's general contention. One C. being in want of money applied to the plaintiff to accommodate him with his acceptance for £150, which the plaintiff did. The bankers would not discount it without another name, and defendant at C.'s request endorsed it. At maturity C. prevailed on the holders to renew, and the new bill was drawn by the plaintiff on C., and endorsed by defendant. Plaintiff, the drawer, was compelled to pay, and sued defendant the endorser for contribution. Leave was reserved to enter a nonsuit on the ground, that as there was no joint liability there was no implied liability to contribute. After argument the Court held that the plaintiff was entitled to recover.

Erle, C. J., says, "If the money had been raised by the joint and several note or bond of the three, it could not for a moment have been contended, that Reynolds paying the whole would not have been entitled to call upon Wheeler for contribution. The machinery adopted here was the

drawing of a bill by Cheeseman upon Reynolds, and the endorsement of it by Wheeler. As between these three parties and the holders, the acceptor would be primarily liable, and, on his failure to pay, recourse would be had to the drawer and the endorser. But their relation to the holder has no bearing on their relation to one another. Reynolds and Wheeler each became surety for the same debt or liability of their principal, Cheeseman. Reynolds therefore, had clearly a right to call upon Wheeler for contribution."

Williams, J., says, "If the relation of surety subsists, he is entitled to contribution, and we are entitled to disregard the form of the instrument. The recent decisions as to suretyship, shew that, not only in actions like the present, but also in cases where the question is, whether the surety has been discharged or not, the form of the instrument may be wholly disregarded."

Byles, J. (who seems to concur with the other Judges), remarked during the argument, "In equity, I believe, it is held that a surety who has been compelled to pay the whole amount, is entitled to contribution, even though he did not at the time of entering into the obligation know that he had a co-surety. This would strike one as remarkable, seeing that the knowledge that he had a co-surety, and consequently a right of contribution, might have been the inducement on the part of each to enter into the engagement."

The doctrine of these cases seems directly opposed to some American authorities, especially the judgment of Chief Justice Marshall in *McDonald v. Magruder*, 3 Peters 477. See also *McCarty v. Roots*, 21 Howard 437.

The law, therefore, seems to be, that if the true nature of the transaction is, that first and second endorsers have endorsed as mere sureties for the maker, having no interest in the matter, and the latter not stipulating expressly for any special right of recourse to the names before his,—the right of contribution exists between them.

I think there was no misdirection. It seems to me that if

James Ianson at the plaintiff's request paid or took up the note, and the plaintiff afterwards repaid him voluntarily, or under legal pressure, that the plaintiff in effect paid the money in exoneration of the liability which he and defendant had undertaken.

It remains to consider whether the evidence supports the verdict.

The parties must stand as they did on the *first* note, because when the second was given in renewal, it was expressly agreed, after discussion, that they should remain on it in the same position.

I think the evidence leads to the result that the plaintiff, when he endorsed the first note, did not do so in any way on the faith or trust that there was to be another endorser.

The authorities shew that this is no bar to his right. It is thus summed up in Byles on Bills, 10th ed., 253: "Though the same debt be secured by different instruments, executed by different sureties, and though one portion of the debt be secured by one instrument, and one by another, and different sureties execute each, still there is mutual contribution; nay, even though the surety seeking contribution did not at the time of the contract know he had any co-sureties. For the right of a surety to enforce contribution does not depend upon contract, but upon the equity of the case."

I would infer from the evidence that defendant when he endorsed the first note, did so in the full belief that the first endorser (the plaintiff) was responsible to him for the full amount if he (defendant) were obliged to pay. He swears that he believed plaintiff and Paul were partners in business.

A mere mistake as to the state of the law will not of course relieve defendant. When he endorsed he has to take the full consequences of his act.

Nor can he, I think, urge that the plaintiff's right to contribution can be barred by defendant erroneously supposing, that he was a partner or interested in the note other than as an accommodation endorser. He does not appear to

have expressly reserved any right to look to the prior endorser, or to have stipulated that he should only be liable on the default of such prior party. It is therefore not necessary to decide what the effect of any such express reservation or stipulation would have been.

I think, therefore, that unless we hold the verdict to be against the weight of evidence we cannot interfere.

We have consulted the learned Chief Justice who tried the case, and he says he cannot say he is dissatisfied with the verdict on the question of fact. Our own perusal of the evidence points to a like view.

Had the jury on this testimony found for the defendant, we should not have interfered.

Rule discharged.

THE CORPORATION OF THE COUNTY OF YORK v. THE
CORPORATION OF THE CITY OF TORONTO.

Court House—Use of—Liability for.

Held, that since the passing of the Law Reform Act, 32 Vic. ch. 6, sec. 22, O, reuniting the City of Toronto to the County of York for judicial purposes, the city is not liable to pay the county any compensation for the use of the Court House.

THIS was an action brought for the recovery of \$5,000 from the defendants, under section 403 of the Municipal Institutions Act, for the alleged use by the defendants of the court house of the plaintiffs.

The following case was stated by consent, under the order of Robert G. Dalton, for the opinion of the Court, without any pleadings:—

1. The court house in question was built before the year 1859, on land belonging to the plaintiffs, situate in the city of Toronto, and was built at the sole expense of the plaintiffs. It has ever since been preserved and kept in repair at the sole expense of the plaintiffs.

2. The City of Toronto was at the time the said court house was erected separated from the County of York, in

which the city is situated, for municipal purposes only, and not for judicial purposes; and so continued until as herein-after mentioned. The council of the city has never at any time made provision for the erection of a separate court house.

3. Until the passing of the statute 24 Vic. ch. 53, the city of Toronto was a part of the County of York for judicial purposes, and the court house of the plaintiffs was used by the defendants, as by all other municipalities situate within the County of York, and for the additional purpose of holding the Mayor's and subsequently the Recorder's Court, which was a distinct Court limited solely to the trial of offences committed within the City of Toronto. The sittings of the several Courts of Assize, Nisi Prius, Oyer and Terminer, and General Gaol Delivery, and of the County Court and Quarter Sessions, were held in the court house of the plaintiffs, and were held for the plaintiffs and defendants jointly—that is to say, causes and matters, whether arising in the city or county, were disposed of in the said Courts on the same footing. But while other municipalities were taxed by the plaintiffs for the erection and maintenance of the court house, no tax was imposed by the plaintiffs on the defendants, for the reason that the said city of Toronto, though territorially situated within the County of York, was not so situated for municipal purposes.

4. Before the passing of the 24 Vic. ch. 53, the defendants paid the plaintiffs annually a sum of money as compensation for the use of the court house, which amount was decided by arbitration; the user being the same as the user of the individuals resident in any local municipality in the county not separated for judicial purposes, with the addition of Mayor's or Recorder's Courts exclusively for the city, held from time to time in the court house.

5. On and after the 18th of May, 1861, the City of Toronto, under the operation of the statute 24 Vic. ch. 53, became and was separated from the County of York for certain judicial purposes, and separate sittings for the

county and for the city of the Courts of Assize and Nisi Prius, Oyer and Terminer, and General Gaol Delivery, County Courts, and Quarter Sessions, and otherwise in that Act provided, were held after the 1st day of July in the said year. The 24 Vic. ch. 53, was explained by the 25 Vic. ch. 24, as regards the County Court and its sittings.

6. Afterwards, on the 6th of June, 1864, an agreement was entered into between the plaintiffs and the defendants, for the separate use of the court house by the defendants, as provided by the 24 Vic. ch. 53, which continued in force until the passing of the Law Reform Act, 32 Vic. ch. 6, sec. 22, O., which re-united the county to the city for judicial purposes, and was the subject of litigation between the parties, as reported in the case decided in 21 C. P. 95.

7. Since the passing of the 32 Vic. ch. 6, sec. 22, the defendants have used the court house of the plaintiffs in the same manner as they did before the passing of the 24 Vic. ch. 53, with this exception, that no Mayor's or Recorder's Courts are now held in the said court house.

8. No compensation has been paid by the defendants to the plaintiffs for such user as last mentioned; the defendants contending, that since the passing of 32 Vic. ch. 6, sec. 22, they have the right to use the court house of the plaintiffs as they now use it, without making compensation of any kind.

The question for the opinion of the court is, whether, upon the facts stated, defendants are liable to pay the plaintiffs any compensation for the use of the plaintiffs' court house. If the Court shall be of opinion in the affirmative, then the *postea* is to be awarded to the plaintiffs, with full costs of suit. If in the negative, then judgment of *Nol. Pros.* with costs of defence, shall be entered up for the defendants. In the event of the Court being of opinion in the affirmative, the amount of compensation shall be settled by arbitration under the provisions in that behalf of the Municipal Institutions Act.

In this term, the case was argued.

Harrison, Q. C., for the plaintiffs.

M. C. Cameron, Q. C., contra.

HAGARTY, C. J., delivered the judgment of the Court.

In the case between the same parties, 21 C. P. 96, the law was fully considered as to the liability of the city on its covenant to pay for the use of the court house, &c., while it was separated for all purposes from the county. This Court held, that the reuniting of the city and county for judicial purposes, with the abolition of the city courts, put an end to the covenant.

The only thing remaining to be argued in this case, seems to be, whether there be a liability (in the words of the case) "to pay the plaintiffs any compensation for the use of the plaintiffs' court house."

The city makes no special use of the court house apart from the County of York. It can hold no courts of its own. Its user is the same in a larger degree as the user by the Town of Newmarket or the Village of Yorkville. Unless there be some express provision in the statute law, I do not see how there can be any special liability created.

Sec. 403 of the Municipal Act, 1866, enacts that, "while a city or town uses the Court House, Gaol, or House of Correction of the county, the city or town shall pay to the county such compensation therefor, and for the care and maintenance of prisoners, as may be mutually agreed upon or be settled by arbitration under this Act."

This must surely be some user independent of the general user as a county court house; some user by the city or town municipality, as such, so as the user would not at the same time be that of the county at large; and, certainly, no such user can now exist as that provided for by the 24 Vic. ch. 53, by which the city was separated for judicial purposes, and had its own Quarter Sessions and Recorder's Court.

The Law Reform Act, 32 Vic. ch. 6, sec. 22, reunites the city to the county for judicial purposes, of which it is to form part, and abolishes its Recorder's Court, &c. Section 24,

declares that nothing in the Act shall affect any existing arrangements between them for the use of the gaol.

The city is now to all judicial intents and purposes, a part of the County of York. Except as part of such county, in common with other municipalities throughout the county, it makes no use of the court house, and in the absence of express enactment providing therefor, I think our judgment must be for the defendants.

The plaintiffs state that they rely on the arbitration clauses in the General Municipal Act, but we cannot hold that there should be an arbitration except in a case clearly provided for, and we can find no provision for a case like the present.

Judgment for defendants.

WELLINGTON V. CHARD.

Assignment of choses in action—Distinct claims—35 Vic. ch. 12 O—Construction of.

Plaintiff sued on an arbitration bond, alleging an award that defendant should pay the plaintiff a sum of money and convey to him certain lands, and assigning as breaches non payment and neglect to convey. Defendant pleaded as to the first breach, that since the 35 Vic. ch. 12, O., the plaintiff had assigned to one B. the money awarded, of which defendant had notice. *Held*, a good plea; for that such assignment of the money alone, without the bond, was valid under the Act.

Action on an arbitration bond, setting out an award, directing defendant to pay the plaintiff a sum of money, \$1,107.18 cents, and to convey to him certain lands, and assigning two breaches, the non-payment of the money, and the non-conveyance of the lands.

Third plea to first breach.—That prior to the commencement of this action, and within the time mentioned in the award for the payment of said money, and subsequent to the passing of an Act of the Legislature of the Province of Ontario, entitled “An Act to make debts and choses in action assignable at law,” the plaintiff, by an assignment

in writing, made by him, the plaintiff, to one George Melbourne Brooks, (who accepted the same) granted, bargained and sold, assigned, and set over the said sum of money mentioned in the said award, and the judgment to be entered thereon, and all and every sum and sums of money then due or thereafter to grow due by virtue of said award for principal, interest, and costs, and all benefit to be derived therefrom, either at law or in equity, or otherwise howsoever to him, the said G. M. B., and the defendant alleges that due notice of such assignment was duly given to the defendant before the commencement of this suit.

To this plea the plaintiff demurred, on the grounds, that it does not shew an assignment of the bond, but only of the money awarded: that the statute does not give the assignee a right of the action on the bond, but that right remains in the plaintiff; that a portion only of the award has been assigned, &c., &c.

*C. S. Patterson, Q.C., and E. B. Fraleck, for the demurrer.
R. B. Jellett, contra.*

HAGARTY, C. J., delivered the judgment of the court.

The statute declares, section one, that, "every debt and chose in action arising out of contract, shall be assignable at law, * * and the assignee shall sue thereon in his own name."

Section three defines that an "assignee" shall include any person entitled to a chose in action, &c., &c., and possessing at the time of action brought the beneficial interest therein, and the right to receive and to give an effectual discharge for the moneys, or the charge, lien, incumbrance, or other obligation thereby secured.

Section six—"In case of any assignment in writing, as aforesaid, and notice thereof given to the debtor or other person liable in respect of a chose in action arising out of contract, the assignee shall have and enjoy the same, free from any claims, defences, or equities which might arise after such notice as against his assignor."

The only question that seems open on this demurrer seems to be, whether a valid assignment under the statute can be made of this sum of money, without an assignment of the bond as the foundation of the contract, or whether one of two distinct claims can be so assigned.

Under this submission, the plaintiff had two distinct claims against defendant; one for the payment of a specified sum, the other for the conveyance of certain lands. No apparent connection is shewn between the performance of the two things. They appear in the pleadings as distinct and independent matters.

If the plaintiff's contention prevail, it will not be allowable under the act to assign to another any one of the payments on a mortgage payable in annual instalments, or on a note payable in like manner, or a specific sum of money due to the assignor on a covenant in a deed providing for other matters between the parties, although the covenant to pay the money be quite independent of other agreements, or matters in the instrument.

I do not think we can limit thus the operation of the late act. The obligation to pay this specific sum of money comes, I think, within the meaning of the words, "a debt or chose in action arising out of contract."

It may be easy to suggest much inconvenience and confusion that might possibly arise from the wide words used in the statute. In this case, on the pleadings, there seems to be no reason to anticipate any difficulty from this assignment.

The plaintiff is bound, I think, to answer the plea, and assign, if he can, any reason against the validity of the assignment as against himself.

The case stands thus: the plaintiff requires the defendant to pay him a named sum, and to convey certain lands. The defendant says, "You have divested yourself by assignment under the statute of all your right to or interest in that sum to a third party, to whom, by law, it now belongs, and to whom I must pay it."

At the first reading, I thought the plea might be open to

the objection, that while setting up the title of a third person, it did not aver that defendant was resisting the plaintiff's claim under the authority and privity of the assignee; (on the law of the cases like the often cited *Biddle v. Bond*, 6 B. & S. 225.) But it seems to amount to an assertion of an absolute divesting of the plaintiff's interest and property in the matter in dispute under statutable authority.

Another difficulty might be suggested by the form of the action. It is a debt on a bond, and the penalty recoverable for one or more breaches; and it could not well be apportioned or divided between two or more claimants.

But the plaintiff here can succeed in this action on proof of the second breach.

The assignee of the moneys in the first breach could, if necessary, sue in debt on the award.

Besides it might be shewn by replication that this action is really brought, (if the fact be so) as well for plaintiff's own benefit, as in trust for the assignee.

Judgment for defendant on demurrer.

PERCY V. GLASCO ET AL.

Action for assault—Provocation by libel.

Held, in an action for assault, that libellous and abusive articles reflecting on the defendants, published on the day of, and preceding, the assault, in a newspaper of which the plaintiff was the proprietor, were admissible in evidence in mitigation of damages.

But where the verdict was for \$50 only, and, though such evidence was rejected, the jury were fully informed by defendants' counsel that the assault was committed in consequence of these articles, and the Court saw no reason to believe that defendants had been prejudiced by the ruling, a new trial was refused, but, under the circumstances, without costs in term to either party.

DECLARATION, for assault and battery.

Plea—Not guilty.

At the trial, at Brantford, before Morrison, J., an assault and a battery were clearly proved.

The defendants wished to prove, that the plaintiff being the proprietor of a newspaper, published on the day of and preceding the assault, had libelled or abused them, or one of them.

The learned Judge refused to allow this evidence, directing that under the circumstances of the assault it could not be given in mitigation; that at that time the plaintiff had done nothing to provoke an assault.

The learned Judge reported that the newspaper article alleged by defendants as one of the reasons why they assaulted the plaintiff, was frequently referred to by defendants' counsel during the trial, and in his address to the jury; and his not being allowed to read it did not in his (the learned Judge's opinion) enhance the damages, or prejudice defendants; that he thought it had an opposite effect.

The jury found for the plaintiff \$50.

In this Term *Lash* obtained a rule *nisi* for a new trial for the rejection of the evidence, and on the ground that the evidence shewed no joint assault.

In the same term *Harrison*, Q. C., shewed cause, and cited *Fraser v. Berkeley*, 7 C. & P. 621; *May v. Brown*, 4 D. & R. 670; 3 B. & C. 113; *Watson v. Christie*, 2 B. & P. 224.

J. A. Miller, contra, cited *Crease v. Barrett*, 1 C. M. & R. 919.

HAGARTY, C. J., delivered the judgment of the Court.

As to the joint assault, we see no ground for interfering. The general question is important.

That previous abuse, verbal or written, does not justify an assault and battery is clear.

Evidence thereof in a criminal proceeding, where the only issue is guilty or not guilty, should, I consider, be rejected.

But the Court, before awarding the proper degree of punishment, may receive affidavits either exculpatory or condemnatory, and consider all the circumstances.

Where a plaintiff seeks damages from a jury, there is something beyond the mere guilty or not guilty in question. The assault being proved, the jury is to find for the plaintiff, but for what damages—for a shilling, or for £500?

I cannot see how a proper amount can be arrived at, except by a review of all the attendant circumstances.

A totally unprovoked attack on a person in a public street would naturally incline a jury to give exemplary damages.

If it were shewn that the assault was committed by a man under the fresh smart of some brutal and unfeeling lampoon reflecting on himself, or what might be dearer to him, on the character of his wife or daughter, I cannot understand why the jury should not be allowed to know this, when asked to assess the damages on a large or small scale.

In either case above suggested, the Judge would tell the jury that they should find for the plaintiff; but the question of how much they are to give the plaintiff, would still remain to be decided by them.

The subject is discussed in Taylor on Evidence, 6th ed. vol. i. p. 355, and several cases cited. Many of the cases are where a defendant seeks to shew in mitigation, that the libel he published was provoked by libels by the plaintiff, leading to and connected with that published by defendant.

In *Watts v. Fraser* (7 C. & P. 370) before Lord Denman, he ruled that he must receive evidence of provocation.

In a note to the above case, page 371, the case of *Judge v. Berkeley et al.* was cited. It was for assault, tried before Burrough, J., in 1825, and the defendant, in mitigation of damages, gave in evidence a series of libellous articles, published respecting defendant in the plaintiff's newspaper, one of them having been published on the day of the assault.

Watts v. Fraser came up in term (7 A. & E. 223). Counsel for the plaintiff, Sir J. Campbell, Attorney General, Sir F. Pollock, and Barstowe, in shewing cause for the plaintiff said, "The publications complained of by the defendant were no doubt admissible in mitigation, if they had been

introduced by regular proof." In giving judgment Lord Denman, C. J., says : " In deciding this case, we must look both to the nature of the proposed evidence, and to the object with which it is offered. The object is to shew that the defendant was provoked by libels published against him. It is of the essence of such a case that some proof should be given of the libels having come to the defendant's knowledge ; if such proof was totally wanting, the defence could not be made available."

May v. Brown (4 D. & R. 670 ; 3 B. & C. 113) was cited by Mr. Harrison as in his favour. I do not think it can be so considered, and in the last case Lord Denman expressed a like opinion.

Fraser v. Berkeley (7 C. & P. 621) was an action for a battery. Evidence was given of a libellous article by the plaintiff on defendant in mitigation. Lord Abinger said, " A defendant certainly cannot put in a libel as a set-off against an assault. The rule is, that that which amounts to a justification must be pleaded, but any matter of palliation or mitigation may be given in evidence under the general issue, and I think its" (viz., the libel) " being the subject of another action makes no difference. Suppose foul words preceded a blow ; would they be the less a provocation because they happened to be actionable ?"

He repeats the same doctrine in his charge : " In actions for personal wrongs and injuries, a defendant who does not deny that the verdict must pass against him, may give evidence to shew that the plaintiff in some degree brought the thing upon himself, and in that view the libel was given in evidence by defendant's counsel. * * The law, I think, would be an unwise law, if it did not make allowance for human infirmities ; and if a person commit violence at a time when he is smarting under immediate provocation, that is matter of mitigation."

I have never seen this case questioned.

The text books are singularly meagre of any information on the subject. Selwyn's *Nisi Prius*, 13th ed., vol. i., p. 52, merely says, " A libel, written by the plaintiff against

the defendant, may be given in evidence by defendant in mitigation of damages, although a cross action be pending for the libel," citing as authority the case of *Fraser v. Berkeley* (7 C. & P. 621).

In *Thomas v. Powell* (7 C. & P. 807) Parke, B., refers to and seems to adopt the view of *Fraser v. Berkeley* (7 C. & P. 621) as to evidence in mitigation.

I also refer to *Tarpley v. Blabey* (2 Bing. N. C. 437).

Many cases shew that a plaintiff in an action of defamation, and in other actions where the malice and motives of the defendant in doing an act are important, may prove other libels than that declared on, or vindictive expressions, or conduct of defendant, with a view of influencing the damages. See *Taylor on Evidence*, 6th ed., vol 1, p. 355, and cases there cited. See, also, *Robertson v. Meyers* (7 U. C. R. 423.)

It is difficult to see on what principle we can exclude evidence, offered not as a bar, but merely in mitigation of the circumstances and moving cause of an assault committed by a defendant, from whom damages are sought.

We are of opinion that the evidence should not have been rejected.

But the question remains whether we should disturb the verdict. The amount is only \$50. The plaintiff would in any event have been entitled to a verdict for something; and in a case like that before us, we should pause before sending it down for trial, in consequence of the difference between that "something," and the damages awarded.

We have been shewn the newspaper articles complained of.

It must be a matter of profound regret that the Press, which ought to be a guide and director of a wholesome public opinion, should be defiled, as it so often unfortunately is, by vicious personalities, and insulting comments on individual conduct.

It seems from the report of the learned Judge, that regularly or irregularly the defendants seem to have fully informed the jury that the assault was committed on the

provocation of the newspaper articles, and we have no reason for believing that the defendants have been prejudiced by the ruling of the learned Judge.

We think, as the plaintiff should have had a verdict in any event, that the sum awarded is not so large as to warrant our interference.

But we think in our view of the law the defendants should not be made liable for the costs in term.

Rule discharged without costs in term to either party.

Rule discharged.

CAMPBELL ET AL. V. HILL.

Leave reserved to enter nonsuit—Practice—Duty of Court—Evidence of insanity.

Where leave is reserved to enter a nonsuit on the whole case after evidence given on both sides, a nonsuit will be ordered unless there be evidence on which a rational verdict for the plaintiff can be founded, which the Court would not be bound to set aside.

In this case a mortgage given in 1848, by a mortgagor who died in 1855, was impeached on the ground of insanity: *Held*, that a rational act (the giving of the mortgage) being proved by testimony not impeached to have been done in a rational manner, and a security given for a valuable consideration, under no suspicion of unfairness or knowledge by the mortgagees of the alleged insanity, the transaction could not be upset by general evidence of insane delusions, expressions, and conduct ranging over a number of years, but none of it bearing on the time when the mortgage was made or in any way approaching the impeached dealing; and the jury on such evidence having found the mortgage void, and rendered a verdict for the plaintiff, a nonsuit was ordered.

THIS was an action of ejectment, brought by the heirs of a person named Campbell, to recover possession of the land in question, under the contention that the mortgage under which the defendant claimed was executed by their ancestor when in a state of insanity.

The case was tried at the last assizes at Barrie, before Wilson, J., and a jury.

From the evidence it appeared, that until the year 1846, Donald Campbell, the ancestor, had been a man of more than ordinary intelligence, and had for several years been collector of the Township of Oro: that, in the beginning of that year, he was afflicted with a religious mania, and acted

in such a manner that it was necessary to confine him and two of his brothers in jail at Barrie for a short time, for preaching in the streets. It also appeared, that after that period he never entirely recovered from his religious delusions, and he appeared to have been indifferent to the management of his farm; but the evidence was of a very indefinite character, the witnesses generally appearing to have had very little intercourse with him.

There could however be no doubt, that on the subject of his religious delusions his mind was in an unsound state, but in other respects he appeared to have understood his business, although he ceased to pay the same attention to his affairs as before he was afflicted.

The only testimony bearing upon his state of mind as exhibited by his conduct at the time when he executed the mortgage now in dispute, was that given by Mr. Lount, and from the evidence of that gentleman the deceased appeared to have acted in a perfectly sane and proper manner. Mr. Lount was the secretary of the building society to which the mortgage was given; and he stated positively, that he did not remark any thing unsound in Campbell's conduct. He said, "There was nothing wrong with him that I could see; I read the covenant to him, he appeared to understand it perfectly well. If I had thought he was unsound of mind I should not, as far as I was concerned, have dealt with him at all." This refers to the time when Campbell applied to be admitted as a member of the building society on the 22nd December, 1847. Mr. Lount further stated, that "he came to the second loan meeting of the society on 7th January, 1848; there were four shares bid off, and he bid off one at 46½ bonus; Burnett, at 48 bonus; Thompson, 2 shares, one at 46 bonus, the other at 47½ bonus. At that bidding I observed nothing wrong with him, or with the others who bid." On the following day, namely, the 8th January, the mortgage in question was executed, being for the purpose of securing the money advanced on this share. Campbell received £53 17s. 6d.

Subsequently to the loan, he paid two instalments. Mr. Lount stated, "I recollect the fact of these payments; nothing seemed wrong with him then; he seemed then as sane as any other man." It appeared that Campbell made no other payment, and that in consequence the land was sold in January, 1852, under a power of sale contained in his mortgage to the building society. Campbell lived until 1854 or 1855; he was engaged as a sailor, and appeared to have lost his life by drowning.

The jury found a verdict for the plaintiffs, leave being reserved to the defendant to move for a nonsuit on the evidence given on the whole case.

In this Term *Harrison*, Q. C., obtained a rule on the leave reserved, to which *McCarthy*, in the same term, shewed cause, and cited *Banks v. Goodfellow*, L. R. 5 Q. B. 559; *Shelford* on Lunacy, ch. 6, sec. 2, page 255; *Thompson v. Leach*, 1 Salk. 427, 576, 675; *Sheppard's Touchstone*, 7th ed., vol. II., 233; *Molton v. Camroux*, 2 Ex. 487; S. C. in appeal, 4 Ex. 17; *Beavan v. McDonnell*, 9 Ex. 309; *Ball v. Ball*, Smi. & Bat. 183; *Yates v. Boen*, 2 Str. 1104; *Faulder v. Silk*, 3 Camp. 126; *Howard v. Digby*, 2 Cl. & F. 661; *Campbell v. Hooper*, 3 Sm. & G. 153, 1 Jur. N. S. 670; *Broom's Com. Law*, 4th ed. 604; *Snook v. Watts*, 11 Beav. 105; *Jacobs v. Richards*, 18 Beav. 308; *Baxter v. Earl of Portsmouth*, 5 B. & C. 170; *Price v. Berrington*, 3 McN. & G. 486.

Harrison, Q. C., contra, cited *Ferguson v. Barrett*, 1 F. & F. 613; *Elliot v. Ince*, 7 DeG. McN. & G. 485, 487, 488; *Ex parte Bradbury in re Walden*, Mont. & Chit. 625; *Martin v. Sedgwick*, 9 Beav. 333; *Ex parte Boulton*, 1 DeG. & J. 163; *Kennedy v. Green*, 3 My. & K. 699; *Ware v. Lord Egmont*, 4 DeG. McN. & G. 473; *Brown v. Jodrell*, 3 C. & P. 30; *Dane v. Kirkwall*, 8 C. & P. 685; *Greenslade v. Dare*, 20 Beav. 285; *Campbell v. Hooper*, 3 Sm. & G. 153; 1 Jur. N. S. 670; *Moss v. Tribe*, 3 F. & F. 304; *Fenton v. Armstrong*, *Brunker's Digest*, 1398.

HAGARTY, C. J., delivered the judgment of the Court.

In a case of *Deverill v. The Grand Trunk Railway Company* (25 U. C. R. 517) the Court had to consider the effect of a reservation of leave to move to enter nonsuit on the whole case, after evidence given both for plaintiff and defendants.

In that case Draper C. J., says, "We are not comparing the evidence, or drawing conclusions of fact from it, but we are looking at all that was proved, to see whether in point of law there was evidence on which the jury ought to have been required or permitted to decide that the plaintiff's case was sustained."

It is not easy to define with perfect exactness the point at which the province of the Court ends, and that of the jury begins.

It is easy to generalize, that the sufficiency and weight of evidence is always for the jury, where there is any evidence.

But where leave is reserved by consent of parties to move for a nonsuit on the whole case, it seems difficult to suppose that nothing is meant except whether any evidence of any character, however weak and slight, is given by the plaintiff.

The case in the Exchequer Chamber, *Avery v. Bowden*, (6 E. & B. 962) seems the nearest in point. A verdict was taken for the plaintiff, leave being reserved to defendant to apply to the Court to set that verdict aside, and enter a verdict for defendant upon the issue, if the Court should be of opinion that there was no evidence to go to the jury of the breach of the charter party on which the action was brought.

On the argument it was urged that there was some evidence, and that its weight and meaning was for the jury.

Pollock, C. B., said, "I do not understand that the question here was, whether there was any scintilla of evidence: the question reserved was whether there was evidence on which a jury would be justified in finding for the plaintiff.

There is surely a distinction between a reservation of the point and a bill of exceptions. * * Where the question, whether there is evidence to go to the jury, is reserved by consent (and it cannot be reserved without consent), 'no evidence' means 'no reasonable evidence.' Where the evidence is such that the Court, had there been no other evidence and the jury had acted on it, must have set the verdict aside, that, on such a reservation, is no evidence. The members of the Profession, if they object to this, may always refuse their consent to the case being reserved: if they give their consent, they consent to the verdict being altered if no reasonable evidence has been laid before the jury. It would be absurd to send a case down to a new trial where, if the jury should find in accordance with the evidence which is relied upon, it would be the duty of the Court to set such verdict aside as being contrary to the weight of evidence."

He suggests a case, "If a witness declared an event to have happened on Tuesday or Wednesday, would that be any evidence that it happened on Tuesday?" and that, "even in the case of a bill of exceptions, though there the language seems to go further, and to raise the question whether there was evidence tending to support the issue?"

Mr. Justice Cresswell's judgment is important. He says, amongst other remarks, that, "If the evidence lead only to conjecture, it is not fit for the consideration of the jury."

In *McMahon v. Lennard*, (6 H. L. 970) the Judges being referred to, delivered their opinion through Wightman, J., page 993: "It may be fit to consider what is to be understood by the expressions 'any' evidence or 'no' evidence to go to the jury. The reasonable rule appears to be, that expressed by the Court of Exchequer Chamber in the case of *Avery v. Bowden* (6 E. & B. 973), in accordance with the opinion of Lord Tenterden, 'That if the evidence was such that the jury could conjecture only and not judge, it ought not to go to the jury; that the onus was on the party offering the evidence, and that if he only offered evidence consistent with either supposition or fact, he was not entitled to have it put to the jury.'"

In a very late case, *Henwood v. Harrison*, (L. R. 7 C. P. 606) Willes, J., page 628, says: "In actions of libel, as in other cases where questions of fact when they arise are to be decided by the jury, it is for the Court first to determine whether there is any evidence upon which a rational verdict for the affirmant can be founded."

That case was for libel. A nonsuit was directed on the ground of privilege. It was upheld by the Court, the same learned Judge saying, "If the case had been left to the jury, and they had found for the plaintiff, it would have been the duty of the Court to set aside that verdict."

The test suggested in the judgment of the Exchequer Chamber is, that when leave is reserved by consent to decide if there be no evidence, then if a verdict pass for the plaintiff on the evidence offered, and the Court must have set such verdict aside; *that* on such a reservation is "no" evidence. This test, if applicable, must dispose of this case.

I think it clear beyond question that we should be bound to set this verdict aside, as based on wholly insufficient evidence.

The test appears to me to be fair. We must see, in the language cited, "whether there is any evidence on which a rational verdict can be founded." If there be no evidence in this case on which a verdict for the plaintiffs could reasonably be founded, was there anything to leave to the jury, and should they not have been told to find for the defendant?

We are not taking upon ourselves to determine what testimony should be believed and what discredited; whether the weight of testimony inclines to one side or the other; but whether the plaintiffs have established a *prima facie* case proper to be submitted to a jury.

We must see what they sought to establish. It was that a deed of mortgage executed twenty-four years ago by a man now many years dead, was null and void on the ground that the grantor was insane and incompetent at the time of execution.

A large amount of evidence was offered as to strange

hallucinations, almost wholly springing from religious excitement and delusion, absurd conduct, and extravagant talk on the part of the grantor, quite sufficient, especially after the lapse of many years, to account for a number of persons honestly declaring their belief that he was a madman, and unfit to transact business, &c.

The great defect in the plaintiffs' case was, that nothing whatever was shewn bearing on the grantor's state at the particular date of the impeached transaction, or in any way to impugn the conduct or good faith of the parties with whom he dealt. There is no attempt to approach the particular dealing, or the particular date of the dealing.

Evidence is then given of the dealing, how it was commenced and carried out, and all the attendant circumstances. A man attends a sale of building society shares, bids for and purchases two shares at somewhat under the rate others were sold at the same sale, attends and arranges with the officers of the society, executes the ordinary mortgage, receives the money, and afterwards makes at different intervals at least two of the monthly payments.

The 'company's officer with whom he transacted this business,—a gentleman of undoubted integrity,—proves all these dealings as having been done in the ordinary course of business, and as with a person who acted rationally, and gave no reason to any one dealing with him to suspect or believe anything was wrong.

This is all the evidence bearing upon the mortgage transaction.

The aspect of the case is, therefore, that in answer to general evidence of insane delusions, expressions, and conduct ranging over a series of years, at some time within that period, a perfectly rational act is proved to have been done, in a perfectly rational manner, and a valuable money consideration obtained thereby, from persons not shewn to have had any reason to believe that the alleged lunatic was not as fit to contract as any other man; the impeaching evidence, as already remarked, failing altogether not only to shew any fraud practised, or advantage taken, but even

to give any special information as to his state at or even about the time of the dealing.

In *Banks v. Goodfellow* (L. R. 5 Q. B. 549), there is a most luminous and instructive judgment of Sir *Alexander Cockburn*, on the subject of mental capacity, reviewing the authorities, and endeavoring to educe therefrom some intelligible principle.

The quotation from the judgment of Sir *W. Wynne*, (page 558), shews the great stress laid on the performance of a rational act in a rational manner, although the Chief Justice declines to go to the full length of the learned Judge of the Prerogative Court.

I make only one extract from Sir *A. Cockburn's* striking judgment (page 560).

"The pathology of mental disease and the experience of insanity in its various forms teach us that while, on the one hand, all the faculties, moral and intellectual, may be involved in one common ruin, as in the case of the raving maniac, in other instances one or more only of these faculties or functions may be disordered, while the rest are left unimpaired and undisturbed; that while the mind may be overpowered by delusions which utterly demoralize it and unfit it for the perception of the true nature of surrounding things, or for the discharge of the common obligations of life, there often are, on the other hand, delusions which, though the offspring of mental disease and so far constituting insanity, yet leave the individual in all other respects rational, and capable of transacting the ordinary affairs and fulfilling the duties and obligations incidental to the various relations of life."

It seems to me that it is impossible to uphold this verdict, in the face of the decision of our Court of Appeal in *Macdonald v. Macdonald*, (16 Grant 37). The facts there were, in my judgment, far stronger to prove a mental unsoundness than in the present case. That he was in reality of unsound mind, was held in the Court below, and not disputed in the Appellate Court.

A summary of the evidence in the Court below (14

Grant 548) states, "Among other delusions and fancies, he imagined that his wife's relations and neighbours had bewitched him; that they did so by putting nails in the stove, and in other ways related by the witnesses; that spirits and fairies were passing through him and around him; that his wife had come into a shanty where he was working, in the shape of an Indian dog; that his friends put snakes and frogs into his food, even into eggs boiled in the shell; that the birds in the air mocked him, and called after him; that when the church bell rang, and the cocks crowed, and the cars sounded, they cried "Banish William Macdonald out of the world;" that a switch he carried was a thing of great power; that there was in it the power of seven priests; that if his brother got hold of it, the brother could hang him or do what he liked with him, &c. He was constantly brooding over these delusions, was never free from them, seldom if ever conversed without bringing them forward, and was in the deepest dejection on account of them. They changed all his habits; prevented his working, interfered with his eating and drinking, and sleeping, and influenced his whole conduct. In less than two months after the transaction in question, he was in gaol in Cornwall as a lunatic, and was subsequently removed to the Asylum in Toronto, where he remained until his death."

All this was subsequent to 1861, and detailed at a trial in 1867 or 1868, and not as here, depending on the recollections of the state of mind of one who had passed away twenty years before the enquiry.

It was held in the last cited case in the Court below, that it is now the rule, that a purchase for value from a lunatic, may not be void, if the purchaser had no notice of the lunacy. The same view of the law was adopted in the Appellate Court, and the case apparently turned on whether the vendee had notice. Draper, C. J., says, "The decree is based on this, that on the occasion of this purchase the vendor William McDonald," (the lunatic,) "told the defendant when the two were alone together, that he was 'bewitched.'

It appears the two were alone together, and, as the result shewed, were discussing the arrangement respecting this land; that the defendant called James McDonald" (who had come with William to defendant's office) "into the room, where he and William were, and told James that William had said to him he was bewitched. James replied that he did not know anything about that; meaning, as he afterwards explained, that for all he knew William might be bewitched, that he knew nothing about it one way or the other."

The Court of Appeal unanimously reversed the decision and upheld the conveyance.

Now the evidence in that case went far to shew an undoubted unsoundness of mind, and in my judgment was of stronger character than that of the case before us.

The various matters sworn to as to McDonald, coupled with the fact of his being in gaol as a lunatic within two months of his execution of the deed, and his subsequent removal to the Asylum where he died, are at least as strong as the religious hallucinations of Campbell, his rhapsodical speeches and conduct; backed up even as they were by proof of his inartistic and unsuccessful attempt to emasculate a pig.

I am wholly unable to understand on what ground a jury assumed the grave responsibility of declaring void a deed executed in the ordinary manner for value, after the lapse of a generation, on such testimony as that before them.

In holding that the rule should be absolute to enter a nonsuit, we do not take upon ourselves to touch upon the province of the jury; to decide what part of conflicting evidence is to be believed and what part rejected.

We hold that when a rational act was done, in a rational manner, proved to be so done by testimony not attempted to be questioned, and a security given for a valuable consideration under no suspicion of unfairness, that such a transaction cannot be upset by general evidence ranging over a number of years, but none of it bearing on the time when the deed was made, or in any way approaching the impeached dealing.

Rule absolute to enter nonsuit.

HAMILTON V. EGGLETON.

Sale of land for taxes—32 Vic. ch. 36 sec. 155 O., construction of.

Held, that sec. 155 of 32 Vic. ch. 36 O., does not make valid a deed given in pursuance of a sale for taxes where there were in fact no taxes in arrear at the time of sale.

EJECTMENT for the west half of lot No. 10 in the fourth concession of the township of Belmont.

The case was tried before Galt, J., without a jury, at Peterborough, in the fall of 1872.

The plaintiff's title was admitted at the trial, and that he was entitled to recover, unless a deed dated the 6th November, 1863, executed by the sheriff of the county of Peterborough, to one Ledyard, on a sale for arrears of taxes, under which defendants claimed, was entitled to prevail over the plaintiff's prior title.

All the facts upon which this question depends were admitted, and were as follows:—

On the 9th June, 1862, the Treasurer of the County of Peterborough issued his warrant of that date to the sheriff, directing him, among other lands directed to be sold for arrears of taxes due thereon, to sell the above west half lot for \$36.04 arrears of taxes alleged to be due thereon. On the 28th June, 1862, the sheriff exposed for sale and sold the lot under this warrant; and upon the 6th day of November, 1863, executed the deed relied upon to Ledyard, the purchaser at the sale.

It was admitted, that the return of this half lot as being in arrear for taxes and liable to be sold was altogether erroneous, for that the plaintiff, the owner of the lot, had regularly paid all taxes imposed upon it; in fact he paid and produced regular receipts for all taxes imposed on the lot up to and including 1870. The error was explained by the allegation of the Treasurer, that in his office an amount paid by the plaintiff on his west half lot, was erroneously credited in the Treasurer's books on the east half, which did not belong to the plaintiff at all. However it was

admitted as beyond doubt that there were no taxes in arrear on the plaintiff's half of the lot at the time of the issuing of the Treasurer's warrant in June, 1862, nor was the plaintiff's lot ever liable to be sold or exposed to sale for arrears of taxes.

The learned Judge before whom the case was tried rendered a verdict for the plaintiff, upon the ground that the sale was void, there having been no taxes whatever in arrear.

In this Term *Kennedy* obtained a rule, upon behalf of the defendant, under the Law Reform Act, to set aside this verdict, and to enter a verdict for the defendant.

Crickmore shewed cause and cited *The Bank of Toronto v. Fanning*, in App. 18 Grant 391; *Dwarris* on Stats., 2nd. ed., 567.

Kennedy, contra, cited *Doe dem. Watson v. Jefferson*, 2 Bing. 118; *Cotter v. Sutherland*, 18 C. P. 357; *Hayden's* case, 3 Rep. 7; *Fraser v. West*, 21 C. P. 161.

GWYNNE, J., delivered the judgment of the Court.

The contention of defendant's counsel in support of his rule rested wholly upon the 155th section of the Ontario Assessment Act, 32 Vic. ch. 36; the contention being, that this section was to be construed as an enactment that the lapse of two years after a sale, however void at the time, even though void for the reason that no taxes were ever in arrear, should give a good title.

It is to be observed, that it is only in the assessment acts that the clause upon which the defendant relies is to be found, not in an Act passed for the purpose of quieting invalid titles, such as the Ontario Statute 33 Vic. ch. 33 was. It is only in the Ontario Statute 32 Vic. ch. 36, and the Act of the Parliament of Canada 29 & 30 Vic. ch. 53, the 156th section of which latter Act only differs from the 155th section of the former in the period named, that the clause in question is to be found. Both of these Acts are Acts passed

for the purpose of consolidating and amending the several Acts of Parliament previously passed respecting the assessment of property.

Now for the purpose of construing an Act of Parliament we must look at the whole object of the Act, and the several clauses thereof, so as to put such a construction upon each clause as shall be consistent with such object, and with the other clauses of the Act.

The object, then, of the Act in which the clause relied upon by the defendants is found, is to provide for the assessment of property, and for levying the rates assessed by sale of the lands assessed, if and when the rates imposed shall be suffered to be in arrear.

Sections 1 to 89 provide for the assessment, prescribing the mode in which it shall be made, and regulating appeals, until a final assessment to which the property shall be subject shall be arrived at.

Sections 90 to 107 provide for the collection of rates charged. It is for taxes *payable* by a party taxed, not taxes which he has paid, and only in the case of *neglect* to pay for a fixed period, that the 95th section authorizes a distress to be made and enforced; it is a list of lands in respect of which *the taxes shall have been in arrear* for three years, that the 110th section requires the Treasurer of every county to furnish to the clerk of each local municipality; it is in relation to *arrears* of taxes that the 118th and 119th sections provide, that after a certain period the officers of local municipalities in a county shall not receive those *arrears*, but that the collection and receipt of payment of such *arrears*, and of all taxes on the land of non residents, shall belong to the county treasurer; and it is only to *recover arrears* that the 128th section authorizes a sale of the land.

Then with reference to a sale so authorized—that is, a sale for arrears of taxes—the 130th section provides, as the 131st section of the Act of 1866, and as the 4th section of 27 Vic. ch. 19, had provided, that “if any taxes in respect to any lands sold,” by the treasurer, in 32 Vic., and

by the *sheriff* in the other Acts, *shall have been due or in arrear*, (for certain prescribed periods before the sale)—“and the same shall not be redeemed in one year after the said sale, such sale and the sheriff’s deed to the purchaser of any such lands (provided the said sale shall be openly and fairly conducted), shall be final and binding upon the former owners, &c. ;” and the reason for this enactment is in the 130th section of 32 Vic., and the 131st section of the Act of 1866, declared to be because “it being intended by this Act that all owners of land shall be required to pay the *arrears of taxes due thereon*,” within the prescribed periods, “or redeem the same within one year after the treasurer’s sale thereof.” It is only “*if the taxes have not been previously collected*,” that the 138th section of 32 Vic., which corresponds with the 139th section of the Act of 1866, and the 137th section of the Consol. Stat. U. C. ch. 55, authorizes a sale at all; and it is in respect of lands so sold—namely, lands in respect of which there was *an arrear of taxes due and unpaid*, that the 149th section of 32 Vic., corresponding with the 150th section of the Act of 1866, and the 149th section of the Consol. Stat. U. C. ch. 55, authorizes a deed to be executed; and it is to such a deed—that is, a deed executed in pursuance of a sale *to levy payment of taxes in arrear and unpaid*—that the 150th section of the 32 Vic., corresponding with the 161st section of the Act of 1866, and the 150th section of the Consol Stat. U. C., gave the operation of transferring the estate of one person to another.

Now the whole object of the Acts, and the whole machinery provided, *being for the purpose of enforcing the payment of arrears of taxes*, and the only authority to sell conferred by the Act being, in case of there being such arrears due out of the land and unpaid, there can, I think, be no doubt that the 155th section of the 32 Vic., corresponding with the 156th section of the Act of 1866, relates only to deeds given in such cases as were in pursuance of a sale contemplated by the Act—namely, a sale for the purpose of realizing payment of taxes in arrear and unpaid.

The only deed authorized to be given being a deed in pursuance of a sale, which was authorized only in the event of there being taxes in arrear and unpaid, the natural construction is, that the 155th section, like all other parts of the Act, relates to the like object—namely, that which the Act authorized, not to an event not at all authorized or contemplated by the Act—namely, a sale of lands in respect of which there were no arrears of taxes due and unpaid, and the owner of which had never been in any default which called for or justified the intervention of the Act.

The object of the clause relied upon, in my opinion, was, as its language appears to me plainly to express, and as is consistent with the whole tenor of the Act, to provide that when lands became liable to be sold for arrears of taxes, and were sold to recover such arrears, and a deed should be given in pursuance of such sale, that such deed should not be questioned for any irregularity or defect whatever, unless within a prescribed period ; but it would be contrary to the whole scope and intent of the Act to hold, that the object of the clause was to make good after a period of two years, a deed given under circumstances in which the Act had not authorized or contemplated any sale at all should take place—in which in fact the very purpose for which alone a sale was contemplated was wanting.

The Bank of Toronto v. Fanning, 18 Grant 391, is no authority for this contention. The Act 33 Vic. ch. 23, which was an Act passed for the purpose of making valid in certain cases invalid sales “under colour of the statutes for taxes in arrear,” does not confirm a sale under the circumstances admitted to attend the sale in this case; for that Act specially provides that it shall not apply (even though the purchaser at the illegal tax sale had gone into possession under his purchase, and had occupied for four years, and had made improvements thereon), if, as is the case here, “the taxes for non-payment whereof the lands were sold, had been fully paid before the sale.”

Now, if this sale be not, and it clearly is not, made valid by an Act passed for the express purpose of making valid

illegal sales "*under colour of the statutes*, for taxes in arrear," how can it be said to be valid by an Act which in the given circumstances never contemplated or authorized any sale taking place, or any deed being executed.

The verdict for the plaintiff should not, I think, be disturbed, as in my opinion, the 155th section of the Statute of Ontario, 32 Vic. ch. 36, upon which clause alone the defendant relies, has no reference to the case of a deed given in pursuance of a sale, when all the taxes assessed upon the land purported to be sold had been fully paid and satisfied before the sale; but only to cases of deeds given in pursuance of sales, where some tax upon the land sold was in arrear, which is the only case in which the Act in which the clause relied upon is found contemplates or authorizes any sale.

The case of *Fraser v West*, 21 C. P. 161, was cited as governing this case, but it in truth has no bearing upon it. That was a case expressly within the provisions of 33 Vic. ch. 23, and that was all that we held in our judgment.

Rule discharged.

TAYLOR V. HORTOP.

Lease—Destruction of premises by fire—Determination of term thereby—Principal and Surety—Estoppel by judgment recovered.

Action on defendant's covenant as surety of a lessee, under a lease of a mill for nine years from 15th December, 1868, at a yearly rent, payable half-yearly in advance on the 15th June and December, in each year, alleging non-payment of three half-yearly instalments of the rent reserved.

Plea, on equitable grounds, that defendant covenanted as surety only: that by the lease it was agreed that in case of the total destruction of the mill by accidental fire, &c., the lease should at once cease and be at an end: that the lessee paid all rent due up to the total destruction of the premises by fire, including the half-year's rent due on the 15th June, 1869; and that the premises were so destroyed on the 30th October, 1869, whereupon the term ceased, and was at an end.

To this the plaintiff replied, that after such fire, the lessee, with the knowledge and approval of the defendant, continued to hold and occupy and still holds and occupies the premises under and by virtue of the lease, and with the like knowledge and approval of the defendant, would not and did not put an end to the said term or surrender said premises.

Held, plea good, for defendant's covenant being restricted to the term ceased with it; and that the replication was bad, as shewing at most the creation of a new tenancy, to which the covenant would not extend.

Defendant also pleaded by way of estoppel, that previous to this action the lessee sued the lessor in the County Court, alleging that by the lease, in the event of total destruction of the mill by accidental fire the term should cease, and the rent be apportioned: that upon such destruction on the 30th October, 1869, the said term ceased, and the lessor became liable to refund to the lessee such part of the rent paid in advance as on a just apportionment should be found due, and the lessee alleged in such action that \$137.50 thus became due to him, for which he sued therein: that the lessor, the now plaintiff, pleaded in such action that the said lease was not his deed, and issue being joined thereon the lessee recovered judgment for the said sum of \$137.50. The plea then alleged that the judgment remained in force, and that the rent sued for in this action was rent accruing due after the said 30th October, 1869.

Held, a good plea; that the judgment recovered, if a bar to the recovery of this rent against the principal, was a good defence for the surety; and that such judgment was a bar, for though the plea of *non est factum* did not put in issue the destruction of the mill and consequent determination of the term, yet these facts being necessarily averred in that action, and not denied, the lessor was now estopped from disputing them.

Held, also, that the replication to this plea, being the same as to the first plea, was bad for the same reasons.

DECLARATION, that the plaintiff, by deed, let to one William Hortop a flour mill, situate, &c., to hold from the 15th of December, 1868, until the 13th of December,

1871, at the yearly rent or sum of \$1100, payable in two equal and even portions of \$550 each, in advance, on the 15th of December and June, and the defendant by the said deed covenanted with the plaintiff that the said W. H. would pay him the same as aforesaid, yet three half-yearly portions of the said rent so covenanted to be paid on the 15th of December, 1869, and on the 15th days of June and December, 1871, are due and unpaid.

First plea, on equitable grounds, that the defendant made the alleged covenant in the declaration mentioned as surety for the said W. H., and not otherwise: that in and by the said deed the said W. H. and the plaintiff agreed, that if the said mill should become untenable, through accidental fire or other fire, the act of any person other than the culpable act or neglect of the lessee personally, or through tempest or lightning, a reduction or abatement in the rent proportionate to the injury done, and for the time that the same should remain unrestored, should be made, and that in case of the total destruction thereof, through or by any of said means, and not through the culpable act or neglect of the lessee personally, the term thereby created should at once cease and be at an end: that from the commencement of the said demise until the destruction of the said mill by fire as hereinafter mentioned, the said W. H. duly paid all the rent by the said deed reserved which up to the time of such destruction had become due and payable, including the half-yearly payment thereof which became due and payable for the half-year commencing on the 15th June, 1869, and had faithfully performed all the covenants and conditions of the said lease on his part to be performed. And the defendant further says that after the making of the said deed, and during the continuance of the said demise, to wit on the 30th day of October, 1869, the said mill was totally destroyed by accidental fire, and not through the culpable act or neglect of the lessee personally, whereupon the said term immediately ceased and became at an end.

Second plea, that the plaintiff ought not to be admitted

to say that the said rent in the declaration mentioned, or any part thereof, is due and unpaid to the plaintiff, because the defendant says, that he made the said alleged covenant in the declaration mentioned as surety for the said W. H., and not otherwise: and the defendant further says, that before this suit, the said W. H. brought an action against the plaintiff in the County Court of the County of Wellington, and declared against the plaintiff,—in and by the first count of the declaration in the said action,—for that the now plaintiff by deed, demised to the said W. H. a mill and mill premises, with the appurtenances, to hold from the 15th of December, 1868, until the 15th day of December, 1877, at the yearly rent of \$1100, payable by two equal portions of \$550 each, half-yearly in advance, on the 15th days of June and December in each year during the said term, the first of such payments, to be made on the day and year first aforesaid; and thereby agreed with the said W. H., that in case the said mill should become untenable through accidental fire, or other fire, the act of any person other than the culpable act or neglect of the lessee personally, or through tempest or lightning, a reduction or abatement in the rent proportionate to the injury done, and for the time the same should remain unrestored, should be made, and that in case of the total destruction thereof through or by any of the said means, and not through the culpable act or neglect of the lessee personally, the term thereby created should at once cease and be at an end, and that the rent should be adjusted at what on a just apportionment should be found to be the due proportional part thereof up to that time, and should be apportioned between the parties thereto accordingly; and the said W. H. averred, that from the commencement of the said demise until the destruction of the said mill by fire as hereinafter mentioned, the said W. H. duly paid all the rent by the said deed reserved, which up to the time of such destruction had become due and payable, including the half-yearly payment thereof which became due and payable in advance for the half-year

commencing on the 15th of June, 1869, according to the terms of the said deed, and performed the covenants therein contained by him to be performed; and the said W. H. further averred, that after the making of the said deed, and during the continuance of the said demise, and whilst the said W. H. was possessed of the said demised premises, and during the currency of the said half-year of the said term, which commenced on the said 15th of June in the year last aforesaid, and for which the said rent was so paid in advance as aforesaid, to wit on the 30th day of October, 1869, the said mill was totally destroyed by accidental fire, and not through the culpable act or neglect of the lessee personally; whereupon the said term immediately ceased and became at an end, and the said W. H. became entitled to have the said rent adjusted and apportioned as aforesaid, and the now plaintiff became liable to refund and pay to the said W. H. so much of the said rent so paid in advance by the said W. H. as aforesaid, as on a just apportionment thereof should be found to be the excess of the said rent beyond the due proportional part thereof, down to the said 30th day of October, 1869: and the said W. H. further said, that on said last-mentioned day when the said total destruction by fire happened, and the said term ceased and ended, the sum of \$137.50 was the sum which upon a just apportionment of the rent reserved by the said deed, should be and was the amount of the said rent so paid in advance by the said W. H. over and above a due proportional part of the said rent down to the said 30th day of October, 1869; and that all conditions, &c., had been performed, &c., to entitle the said W. H. to demand and have the said \$137.50 from the now plaintiff, yet the now plaintiff had not paid the same; and the now plaintiff afterwards pleaded to the said first count of the said declaration, that the said alleged deed was not his deed; and the said W. H. afterwards replied to the said plea of the now plaintiff in the said action by joining issue upon the said plea; and such proceedings were thereupon had in the said action, that afterwards the said issue

so joined in the said action came on for trial, and upon the said trial the judge before whom the same was tried, as to the said issue so joined as aforesaid said, that the said deed was the deed of the now plaintiff: and thereupon afterwards, since this suit, it was considered by the judgment of the said court, in the said action, that the said W. H. should recover against the now plaintiff the said debt of \$137.50 with \$67.04 for the said W. H.'s costs of suit; and the said judgment still remains in force; and the deed and demise mentioned in the said first count of the said declaration in the said action, and the deed and demise in the declaration in this action mentioned, are the same; and the rent sought to be recovered by the plaintiff in this action, is the rent which, if the said demise had remained in force, would have accrued due under the said deed, for three half-yearly payments of such rent in advance, next after the said 30th day of October, 1869; wherefore he prays judgment, if the plaintiff ought to be admitted against the said record to say, that the said rent in the declaration mentioned, or any part thereof, is due and unpaid to the plaintiff.

The same Replication was pleaded to each plea—namely, that after the said mill was destroyed, the said W. H., with the knowledge and approval of the defendant, continued to hold and occupy the said premises, and still holds and occupies the same, under and by virtue of the said deed and demise in the declaration and plea mentioned, and with the like knowledge and approval of the defendant, would not, and did not put an end to the said term, or surrender the said premises.

The defendant demurred separately to each of these replications on the ground that the replication confesses but does not avoid the said plea.

The plaintiff joined in demurrer, and gave notice of the following exceptions.

To the first plea:—1. That the plea does not allege as a fact that the term was put an end to, or that the tenant ceased to hold the premises under the alleged demise, or that he surrendered the same; 2. That the plea is not a

sufficient answer to the declaration; 3. That the plea ought to shew that the premises were in law and in fact surrendered; 4. That for anything which appears to the contrary, the tenant holds the said premises under the said demise as before the fire took place.

To the Second Plea:—1. That the action in the County Court did not try the question whether the term was put an end to, and that was not essential to or disposed of in that action; and that the plea of *non est factum* only admitted the allegations in that action for the purposes only of that action; 2. That the plea does not allege as a fact, that the term was put an end to, but merely that it was so stated in the pleadings in the said County Court action; 3. That the said plea only professes to answer part of the plaintiff's cause of action; 4. That the cause of action in the County Court was not any part of the rent in respect of which this action is brought; 5. That the plea ought to have shewn that the demised premises were in law and in fact surrendered; 6. That it does not appear but what the tenant still holds the said premises under the said demise; 7. That for anything which appears to the contrary in said plea, the tenant is entitled to hold the said premises under said demise the same as before the fire took place.

In this term the demurrer was argued.

Anderson, Q. C., for defendants, cited *Tayleur v. Wildin*, L. R. 3 Ex. 303; *Carter v. James*, 13 M. & W. 137; *Smith* Leading Ca. 6th Ed. vol. ii.; *Howlett v. Tarte*, 10 C. B. N. S. 825; *Bouleau v. Rutlin*, 2 Ex. 681; *Carscallen v. The Municipality of Saltfleet*, 17 U. C. R. 224; *Regina v. Inhabitants of Hartington*, 4 E. & B. 794; *Whitaker v. Jackson*, 2 H. & C. 931.

M. C. Cameron, Q. C., contra, cited *Carter v. James*, 13 M. & W. 137.

GWYNNE, J., delivered the judgment of the Court.

That the first is a good plea at law, as well as in equity, there cannot, I think, be entertained a doubt. What the

surety covenants is that the lessee shall pay the rent during the term. The defendant in effect alleges in his plea that by a provision in the lease it was agreed, that upon the happening of a given event, namely, the destruction of the demised premises, not occasioned by the act or neglect of the lessee, the term should at once cease and be at an end. He then avers the happening of the event which determined the term; "whereupon," he adds, as a conclusion of law, "the said term immediately ceased and became at an end."

If the term is at an end by the act pleaded, the defendant's liability, which was limited to the duration of the term, is at an end also.

If the lessee continued in possession of any part of the demised premises after the total destruction of the principal part thereof, such continuance in possession, whether with or without the knowledge and approval of the defendant, was either a wrongful holding over after the expiration of the term, or a holding by the permission of the lessor, either as a tenant at will, or for some new term; in either of which cases, the plaintiff would have his appropriate remedies: *Ibbs v. Richardson*, 9 A. & E. 849. But the defendant's covenant being restricted to the duration of the term, and the happening of the event, which in the terms of the lease, determined the term, being well pleaded in the plea, and in terms admitted by the replication, the defendant's liability under his covenant is extinguished, and the replication is no more than an averment that after the determination of the term by the destruction of the mill, the lessee with the knowledge and approval of the defendant, continued in possession by virtue of the said deed and demise, creating a term which was at an end, and did not put an end to a term, which by the terms of the demise was put an end to by the total destruction of the mill.

I am of opinion that the replication is bad, and that the plea is a good bar to the action against the surety. The cases *Giddens v. Dodd*, 3 Drewry, 485; and *Tayleur v. Wildin*, L. R. 3 Ex. 303, if authority be wanting, are, as it seems to me, conclusive upon this point.

With reference to the second plea, assuming it for the present to be good, the replication is, I think, bad, for the like reasons as the replication to the first plea is bad.

The substantial argument upon the exceptions to the plea was, that the recovery in the former action determined nothing which could operate as an estoppel to the plaintiff's right to recover under the demise for the rent sued for. No objection was taken to the technical frame of the plea, being in form by way of estoppel; and it was not contended that the defendant, as surety for the lessee, was not in privity with the judgment, in the sense of being able to plead it by way of estoppel.

I cannot find any case to the effect that a surety is a "privity" in this sense, but there can be no doubt that a surety can plead in bar of an action against himself, any matter shewing that the plaintiff's remedy is lost against the former, for whom defendant became surety. A surety may therefore plead in bar of an action against himself, that the plaintiff is estopped from making any demand in respect of the same matter against the principal, by reason of a judgment recovered by the principal against the plaintiff, which goes to the root of the plaintiff's remedy against the principal; and this is in substance what this plea professes to do. It is in effect a plea in bar of the plaintiff's right to recover against the surety for the rent alleged to be due by the lessee, because, by reason of the former recovery the plaintiff is estopped as against the lessee from recovering the same sum under the demise in the deed.

Now as between the lessor and the lessee, I have not a doubt that, however liable the lessee may be to the lessor in an action for overholding after determination of the term, or in use and occupation or otherwise, the former recovery does operate as an estoppel to the lessor claiming the rent now demanded as reserved by the lease during the term thereby granted.

The declaration in the former action averred, that the lease contained a clause for determining the term upon the happening of a certain event, namely, the total destruction

of the principal thing demised, and it averred the happening of that event, and that thereupon, under a provision in the deed of demise, the lessee became entitled to have refunded to him a just proportion of the rent already paid by him half-yearly in advance, amounting to a sum of money which he claimed to be the amount so repayable to him in that action, and for which he declared. The plea of *non est factum* to this declaration expressly put in issue the fact, whether or not the lease contained such a provision for determining the term; that plea was found against the pleader, the lessor, and so he is forever estopped as between him and the lessee from averring that the lease did not contain such a provision for determining the term. True it is, that *non est factum* does not put in issue whether or not the event happened, the happening of which determined the term, but this plea being alone pleaded to a declaration containing an averment of the happening of that event which established the right at the same time of the plaintiff therein to an apportionment, which averment was necessarily made to entitle the plaintiff in the action to recover, and the defendant below not having traversed that material averment, which if traversed and found for the defendant in the former action would have barred the plaintiff therein, the lessor is forever estopped now as against the lessee from saying, that the mill was not totally destroyed by fire as therein alleged; and that fact being determined is in the terms of the lease conclusive as to the determination of the term: *Boileau v. Rutlin*, 2 Ex. 681; *Whittaker v. Jackson*, 2 H. & C. 926; *Howlett v. Tarte*, 10 C. B. N. S. 825; and other cases cited.

Judgment will be for the defendant on the demurrer to the replications, and also upon the exceptions to the pleas.

Judgment for defendant.

CAHUAC V. SCOTT.—CAHUAC V. ERLE.

Ejectment—Statute of Limitations—Vesting Order—Evidence.

On the 9th January, 1844, one J. W. took possession of the land in question under an indenture of lease, for four years, executed by C. the owner, under power of attorney, at the rent of £15 a year. This instrument also contained the right to purchase for £250, £50 to be paid on the execution of the instrument, and the balance in four instalments of £50 each, on the 9th January in each year, the first payment to be made on the 9th of January, 1845; and if purchase carried out, in lieu of the rent reserved a sum equal to six per cent. on the original purchase money should be paid. J. W. made the first payment of £50 at the time of executing this instrument, and deposited £50 in the Bank to meet the second; but the person in whom the legal estate was vested having died, it was not paid, and nothing more was done. J. W. remained in possession until his death in 1850, when he was succeeded by his son, to whom it appeared that he had previously sold, and the son conveyed to the defendants, who entered, and had been in possession ever since.

Held, that H., the plaintiff, claiming under C.'s will, was barred by the statute.

Held also, that the fact of the son shewing to the defendants when he sold to them a letter written by C.'s attorney at the time of his father's purchase, to the person then in charge of the land to deliver possession to his father, did not create a new tenancy at will between the defendants and C.

Held also, that the execution of a deed in 1862 by J. W.'s heir-at-law to one R., who in 1869 conveyed to the plaintiff, did not defeat the defendants' title, as they were in possession not in privity with him.

Held also, that a vesting order of the Court of Chancery of England, proves itself on production, by the Imperial Act 14 & 15 Vic., ch. 99, and was therefore properly received in evidence.

Held also, that as the entry of J. W., under whom the son and the defendants claimed, was under C., defendants could not object to C.'s title at the time of J. W.'s entry.

THESE were actions of ejectment to recover possession of parts of Lot No. 14 in the 3rd concession of the township of Hamilton.

The plaintiff claimed as grantee of one Thomas Grueber, who was devisee in trust for the plaintiff's use of Catharine Cahuac, deceased, who claimed under the will of Thomas Schofield, the patentee of the Crown.

The defendants, besides denying the plaintiff's title, claimed respectively title in themselves by length of possession.

The cases were tried before Hagarty, C. J. C. P., without a jury, at Cobourg, at the Fall Assizes of 1871.

There was no evidence taken, but it was agreed that the evidence taken in a case in the Queen's Bench at the suit of the same plaintiff against one Bustard Hamilton, for a portion of the same lot, should be read and taken as evidence herein (a).

The evidence taken in that case was as follows.

The plaintiff put in.

1. Exemplification of patent to Thomas Schofield, dated 29th July, 1799.

2. Will of Thomas Schofield, produced from the Surrogate office, dated December 5th, 1804; whereby he devised to Alexander Wood and Robert Henderson as Trustees for sale. And a witness was called who proved that he came to Toronto in 1815, then York, and was well acquainted with Alexander Wood, as well as with the Henderson family, but had never heard of Robert Henderson, and presumed if there ever were such a person he must have been dead before that date.

3. Commission filed and used in a case of *Farrel v. Stephens*, 17 U. C. R. 250, under 14 & 15 Vic. ch. 168, an Act specially passed for the purpose of allowing any commission used in any suit to prove the heirship of Isabella Farrel the plaintiff, to Alexander Wood, if upheld by the Court, to be used in any other suit for the same purpose. Also the exemplification of the judgment and rules nisi and absolute in that suit. This was taken after the time specified for taking it, and it was objected to on this ground.

4. Vesting order, under the seal of the Court of Chancery of England, dated 14th April, 1855, In Re the trusts of Thomas Schofield's will, produced under the Imperial statute 14 & 15 Vic. ch. 99, which after reciting the making of the will of Thomas Schofield, and the devise to Wood and Henderson, and proof of their death and other matters, ordered that the real estate devised in trust to Wood and Henderson do vest in Catharine Cahuac. This was objected to as not evidence of anything therein contained, and that

(a) In the case in the Queen's Bench judgment was given *pro forma* in Hilary Term in accordance with the judgment in this Court.

it was not properly proved ; no proof being given of any suit or proceeding in which it was made.

5. Certified copy from the probate Court of London, England, of the will of Catharine Cahuac, by which she devised all her estates in Canada to Thomas Grueber and William L. Tear, in trust for her daughter Ann Cahuac, the plaintiff. A witness proved the service of a notice of the intention to use the probate of this will, and it was objected that under this notice only the probate itself, and not a copy, could be used.

6. Commission taken in this suit, proving under oath the death of Catharine Cahuac, on the 22nd of April, 1857, and of William L. Tear in the month of October, 1864 ; also the execution of a deed produced from Thomas Grueber to Ann Cahuac the plaintiff, dated 23rd June, 1868.

7. Deed. David White to Richard Ruttan, dated 6th September, 1862.

8. Deed. Richard Ruttan to Ann Cahuac, the plaintiff, dated 17th March, 1869.

It was further objected on the part of the defendants, that there was no sufficient evidence of the death of Robert Henderson.

The evidence for the defence was then gone into, from which it appeared, that on the 9th January, 1844, an indenture of lease was executed between Catharine Cahuac, of the first part, and Josiah White, of the second part, executed by Catharine Cahuac, by her attorney by substitution, Robert Baldwin ; whereby it was witnessed, that Catharine Cahuac demised the whole lot number 14, to Josiah White, for a period of four years from the 9th of January, at the yearly rent of £15, in equal half-yearly payments, on the 9th of July and January in each year. This instrument contained also an agreement for the sale of the land to Josiah White, for the sum of £250, which White covenanted to pay as follows : that is to say, £50 on the execution of the said indenture, and the remaining sum of £200, in four equal instalments of £50 each, the first payment thereof to be made on the 9th day of January, 1845, and the interest thereon half-yearly. And

it was agreed, that the rent of £15 per annum should abate upon each payment of principal, at the rate of six per cent. on the instalment paid, so that the amount of rent should always be a sum calculated at six per cent. upon the unpaid purchase money.

At the time of the execution of the indenture, White paid to Mr. Baldwin, as and for the first instalment, the sum of £50, for which a receipt was given at the foot of the instrument, signed "Baldwin & Son," and an indorsement was also made on the instrument. "1844, January, 9th, By cash for first instalment of £50, Baldwin & Son." White also lodged £50 in the bank to meet the second instalment, but Mr. Wood, in whom the legal estate was then vested, having died in the meantime, it was not paid.

Under this instrument Josiah White entered into possession, and remained in possession until his death, which took place on the 18th January, 1850, when he was succeeded by his son, Josiah Charles White, to whom it appeared he had previously sold. No conveyance however was ever executed, but the son received a receipt shewing the terms of his purchase; and Josiah Charles White subsequently in 1855, conveyed to the defendants, who entered into possession, and have been in possession ever since.

It appeared, however, that at the time Josiah Charles White sold, he shewed to his vendees a letter from Baldwin & Son to one Davey, who then had charge of the property, written at the time of his father's purchase, namely, the 9th January, 1844, as follows:

Toronto, 9th January, 1844.

Dear Sir,—We have this day sold lot No. 14, in the third concession of Hamilton, containing 200 acres, more or less. You will please therefore give possession of the same to Mr. Josiah White, the purchaser.

Yours, &c.,

P. DAVEY, Sen'r,
Hamilton.

BALDWIN & SON.

But it appeared from Josiah Charles White's own evidence, that he shewed this, together with the receipt

received from his father, for the purpose of informing them of the nature of the title under which he was selling, explaining to them at the time how much of the original purchase money had been paid, and what remained unpaid.

It also appeared, that when Josiah White purchased, the lot was in a state of nature; and that Josiah Charles White was not the eldest son, but one David White was.

At the conclusion of the defence it was contended on behalf of the plaintiff, that any statutory possession on the defendants' part was put an end to by the deed from White's heir to Ruttan, and also that by Josiah Charles White avowedly selling to his vendees under the Cahuac title a new tenancy at will was created between his vendees and Mrs. Cahuac; also that when Josiah White entered upon the land it was in a state of nature; and that no power of attorney to Baldwin was proved.

It was contended for the defendants, however, that when the deed was made to Ruttan the defendants were in possession, not claiming through David White.

The learned Judge was of opinion that there was a sufficient twenty years' possession, and entered a verdict for the defendants, with leave to the plaintiff to move the Court to enter a verdict on the evidence in her favor.

In this Term *Patterson*, Q. C., obtained a rule *nisi* accordingly: the grounds taken in the rule being, that the plaintiff established her title to the land; that the defendant and those under whom he claims had no title by possession, because—1. No possession of the lot was shewn sufficient to operate under the statute. 2. Possession was shewn to have been taken while the land was in a state of nature, and it was not shewn that the grantor or any one claiming under her had knowledge of the same being in the actual possession of any other person. 3. By the sale by J. C. White, in or about 1855, a tenancy was created between his vendée and the then owner of the land.

Kerr, of Cobourg, shewed cause, and cited *McGregor et al. v. La Rush*, 30 U. C. R. 299; *Farrel v. Stephens*, 17 U.

C. R. 250; *Davis v. Henderson*, 29 U. C. R. 344; *Jones v. Cleaveland*, 16 U. C. R. 9.

Patterson, Q. C., contra, cited *Re Schofield*, 24 L. T. 322; *Re The Trustee Act*, 1850, and *Groom's Trust Estate*, 11 L. T. N. S. 336; *Taylor* on Evidence, 6th ed., vol. ii., p. 1337; *Johnson et al. v. McKenna*, 10 U. C. R. 520; *Turner v. Doe dem. Bennett*, 9 M. & W. 643.

GWYNNE, J., delivered the judgment of the Court.

The will of Thomas Schofield was produced from the Surrogate Court, dated 30th May, 1801, also a codicil thereto, dated 5th December, 1804, whereby he conveyed the land in question to Alexander Wood and Robert Henderson, in trust to sell, and one of the objections taken upon the part of the defendants was, that the legal estate was not traced out of these trustees to the plaintiff.

But we are of opinion that for two reasons there is nothing whatever in this objection, for we think that the vesting order of the Court of Chancery of England, dated the 14th day of April, 1855, under the seal of the Court of Chancery, whereby, after reciting the making of the will of Thomas Schofield, and the devise in trust to Wood and Henderson, and proof of their death, and other matters, it was ordered, that the real estate devised in trust to Wood and Henderson do vest in Catharine Cahuac, is an original order which upon production proves itself, under the Imperial Statute, 14 & 15 Vic. ch. 99, and was properly admitted and received in evidence.

And further, we are of opinion, that it appearing, as we think it clearly does upon the evidence for the defence being entered into, that the entry of Josiah White, under whom Josiah Charles White claims, under whom the defendants claim, was under Mrs. Catharine Cahuac, the plaintiff's deviser, we do not think that the defendants can now object as to the sufficiency of the evidence of Catharine Cahuac's title at the time of such entry by White; although they may insist that her title has become extinguished by the operation of the Statute of Limitations barring entry after twenty years' dispossession. The cases

therefore are resolved into the simple question, is or not the plaintiff's title barred by length of possession?

A bare statement of the case, as established by the evidence, will shew that the defendants are respectively entitled to retain their verdicts.

In January, 1844, Josiah White entered, in virtue of an indenture made between Catharine Cahuac of the first part, and Josiah White of the second part, and executed by Catharine Cahuac, by her attorney by substitution, Robert Baldwin, whereby it was witnessed that Catharine Cahuac demised the whole lot number 14 to White, for a period of four years from the 9th day of the month of January, yielding and paying therefor the yearly rent of £15 in equal half-yearly payments, on the 9th of July and January in each year. The instrument contained also an agreement for the sale of the land to Josiah White, for the sum of £250, which White covenanted to pay as follows: that is to say, £50 on the execution of the said indenture, and the remaining sum of £200 in four equal instalments of £50 each, on the 9th day of January in each year, the first payment thereof to be made on the 9th day of January, 1845, and the interest thereon half-yearly; and it was agreed that the rent of fifteen pounds per annum should abate upon each payment of principal, at the rate of six per cent. on the instalment paid, so that the amount of rent should always be a sum calculated at six per cent upon the unpaid purchase money.

At the time of the execution of this indenture White paid to Mr. Baldwin, as and for the first instalment, the sum of £50, for which a receipt is given at the foot of the instrument, signed "Baldwin & Son"; and an endorsement is also made on the instrument, "1844, January 9th, By cash for first instalment, £50, Baldwin & Son." White also lodged £50 in the bank to meet the second instalment, but Mr. Wood, in whom the legal estate was then vested, having died in the meantime, that sum was not paid. Nothing more whatever appears to have been done.

Josiah White then paid £50 in advance, which sum

would be about equal to the rent reserved of £15, payable half-yearly.

It may be admitted that under the circumstances White could not have been disturbed during the term of four years.

The most favorable light in which the case can be viewed for the plaintiff is, that the right of entry of Catharine Cahuac, under whom the plaintiff claims, first accrued at the expiration of one year from the termination of the four years from 9th January, 1844, namely, the 9th of January, 1849, at which time the evidence, we think, sufficiently establishes that Josiah White, or Josiah Charles White, by conveyances from whom the defendants' claim, was in possession. Josiah White having been in possession after the expiration of the four years' term under a bare contract to purchase from Catharine Cahuac, and her right of entry having accrued at least as far back as the 9th of January, 1849, the Statute then began to run, subject to the provision in favor of persons not being in this Province when the right of entry first accrued; but that provision being repealed by 25 Vic. ch. 20, the case is to be considered as if Mrs. Catharine Cahuac was in this Province in January, 1849, when the right of entry first accrued.

The statute having thus begun to run continued to run, unless, as was contended on behalf of the plaintiff, the fact of Josiah Charles White having shewn to those to whom he sold in 1855 a letter, which was produced, dated the 9th of January, 1844, from Baldwin & Son to one Davey, who then had charge of the land on behalf of Mrs. Cahuac, constituted evidence of a new tenancy at will between the vendees of Josiah Charles White and Mrs. Cahuac. The letter is as follows:—

Toronto, 9th January, 1844.

Dear Sir,—We have this day sold lot No. 14, in the third concession of Hamilton, containing 200 acres, more or less. You will therefore please to give possession of the same to Mr. Josiah White the purchaser.

Yours, &c.,

P. DAVEY, Sen'r,

BALDWIN & SON.

Hamilton.

We cannot see how the exhibition of this letter by Josiah Charles White to his vendees can have any such effect as was contended for. The evidence rather shews that it was exhibited, together with a receipt spoken of from Josiah White to Josiah Charles White, to shew the nature of Josiah Charles White's right to transfer the possession to the purchasers; and what they would naturally conclude would be, that at most they might be held liable to pay the balance of the purchase money, the amount of which Josiah Charles White says he explained to them, in case Mr. Cahuac's title should be asserted at any time before it should be barred by the statute; but we cannot see that the exhibition of the letter to Josiah Charles White's vendees could have any effect to stay the running of the Statute of Limitations, or to evidence the creation of a new tenancy at will between Mrs. Cahuac and Josiah Charles White's vendees.

It was also contended that a deed produced, dated the 6th of September, 1862, whereby one David White, said to be the heir-at-law of Josiah White, purported to grant the lot in question to one Richard Ruttan, who afterwards, by deed dated the 17th March, 1869, purported to convey the same lot to the plaintiff, had the effect of stopping the running of the statute; but at the time of the execution of the deed of the 6th of September, 1862, the present defendants were in possession not in privity with David White, and David White had neither title or possession to convey. That deed can have no operation whatever to prejudice or affect the defendants' possession, or their defence to this action, that the plaintiff's right of entry is barred by the Statute of Limitations. If an action of ejectment had been commenced by the plaintiff in September, 1862, that would have been a more effectual way of serving her interests than the execution of the deed of 6th September, 1862, if that deed when executed was intended to be taken in her interest.

We think that upon the evidence the verdicts rendered for the defendants should not be disturbed.

Rules discharged.

MEMORANDA.

In the vacation preceding this Term the Honorable OLIVER MOWAT was appointed Attorney General for the Province of Ontario, in the place and stead of the Honorable ADAM CROOKS, resigned.

During this Term, the following gentlemen were called to the Bar :—

GEORGE DORMER, BEAUFORT HENRY VIDAL, FREDERICK, WILLIAM MONRO, CHARLES CORBOULD, JAMES FLETCHER, JOHN ALEXANDER GEMMELL, WILLIAM ROAF, JOHN AUGUSTUS BARRON, RODERICK STEPHEN ROBLIN, MARTIN MALONE, JOHN ROWE, ALEXANDER FRASER MCINTYRE, JAMES ROBERT STRATHY, ROBERT McMILLAN FLEMING, CHARLES HENRY RITCHIE, GEORGE McNAB, JOHN AKERS, JOHN WHITE, JOHN ANDREW PATERSON, ROBERT SEDGEWICK, NEWMAN WRIGHT HOYLES, JAMES BRUCE SMITH, THOMAS LANGTON, HUGH JOHN MACDONALD, WILLIAM REDFORD MULOCK, RICHARD JOHN WICKSTEAD.

In the Vacation succeeding this Term,

DANIEL McMICHAEL, CHRISTOPHER SALMON PATTERSON, EDMUND BURKE WOOD, JOHN T. ANDERSON, THOMAS MOSS, on the 13th December, and ROBERT STUART WOODS, JAMES A. HENDERSON, D.C.L., D'ARCY BOULTON, ALEXANDER LEITH, THOMAS ROBERTSON, HON. JOHN O'CONNOR, HECTOR CAMERON, JAMES BEATY, junior, GEORGE A. DREW, JAMES MACLENNAN, DAVID TISDALE, D'ALTON MCCARTHY, and HEWITT BERNARD, on the 18th December, were appointed Her Majesty's Counsel for Ontario by his Excellency the Governor General,

IN Michaelmas Term, 1872, 7th February, the Courts of Queen's Bench and Common Pleas made the following rule:

"IT IS ORDERED, that the following Amendments be made in the Tariff of Fees in the Courts of Queen's Bench and Common Pleas, made by the Judges of the Superior Courts of Common Law, in Michaelmas Term, 1871 :—

1. That the portion of said Tariff that is in the words and figures following,—to wit: Fee with brief at trial in cases of tort or in ejectment, or in matters of contract, when the sum recovered exceeds \$400,—be struck out, and that the following be substituted in the place thereof, to wit :—

FEE WITH BRIEF AT TRIAL.

2. That there be added to the allowance to witnesses in that tariff, after the allowance therein to Barristers and Attorneys, Physicians, and Surgeons, the following :—

Engineers and Surveyors, when called upon to give evidence of any professional service rendered by them, or to give evidence depending upon their skill or judgment, per diem, \$4.00.

If the witnesses attend in one cause only, they will be entitled to the full allowance. If they attend in more than one cause, they will be entitled to a proportionate part in each cause only.

The travelling expenses of witnesses, over ten miles, shall be allowed, according to the sums reasonably and actually paid, but in no case shall exceed one shilling per mile one way.

(Signed)	WILLIAM B. RICHARDS, C. J.
"	JOHN H. HAGARTY, C.J., C.P.
"	JOSEPH C. MORRISON, J.
"	ADAM WILSON, J.
"	JOHN W. GWYNNE, J.
"	THOMAS GALT, J."

IN THE COURT OF ERROR AND APPEAL.

THE ROYAL CANADIAN BANK (Plaintiffs in the Court below)
Appellants, v. STEVENSON (Defendant in the Court
 below) *Respondent*.

Appeal struck out as set down too late—Costs

Where the Court refused to hear an appeal, and ordered it to be struck out, because it had not been set down for argument within the time allowed by 34 Vic. ch. 11, sec. 4 O.: *Held*, that the respondent, who had appeared to answer the appeal, was entitled to his costs, for the appellant should have applied earlier for an extension of the time; and that the Court had jurisdiction to grant costs, though the appeal had not been heard.

Semble, that the respondent should have stated the lapse of time as one of his reasons against the appeal.

APPEAL from the decision of the Court of Common Pleas.

On the appeal coming on for argument (*a*), it appeared that it had not been set down within the period required by 34 Vic. ch. 11, sec. 4, Ont., namely, one year; nor had any application been made, before the expiration of the time, to extend it.

Anderson, Q. C., for the appellants, applied to have the time for hearing the appeal extended, and for leave to argue the appeal, contending that it was a matter in the discretion of the Court, notwithstanding the Statute referred to. He referred to *Lord Ward v. Lumley*, 5 Ex. N. S. 656, as being in favor of his contention, and produced an affidavit, giving the reasons why the appeal had not been set down within the required time.

Moss, Q. C., for the respondent, contended that this was

(*a*) On the 6th January, 1878, before DRAPER, C. J., of Appeal, RICHARDS, C. J., SPRAGGE, C., HAGARTY, C. J. C. P., WILSON, J., GWYNNE, J., GALT, J., STRONG, V. C., BLAKE, V. C.

not a case for indulgence, as the point relied upon by the appellants was a technical one, namely, the want of a seal to a lease, and that the application should be refused.

The Court held, that under the circumstances the application could not be allowed, and ordered the appeal to be struck out.

Moss, Q. C., then asked for the costs of the appeal, and of the application.

Anderson, Q. C., opposed this, contending that as the Court had refused his application, and the appeal had not been heard, there should be no costs.

Cur adv. vult.

The judgment of the Court was delivered by

BLAKE, V. C.—By the Statute under which the appellants are proceeding, their appeal must be brought to a hearing within one year after the giving of the judgment appealed from, or within such further time as the Court of Error and Appeal may allow. More than a year elapsed in this case between the giving of the judgment appealed from and the bringing the cause to a hearing in this Court; and the appellants had not before the hearing made any application to the Court for an extension of the time within which such hearing should take place.

The appellants were aware of the necessity of obtaining the leave of the Court, in order that their appeal should be entertained, and upon the cause being called on, their counsel applied upon affidavit to the Court to allow the appeal. No notice seems to have been given of this application, but the counsel for the respondent answered the motion, which was refused by the Court; and he then asked for the costs of this application, and for a dismissal of the appeal with costs.

It was urged by the appellants, that as the appeal could not be heard the Court had no jurisdiction to deal with it, and to grant the costs thereof to the respondent.

It was not urged that the respondent should have moved to quash the proceedings, or that the delay should have

formed one of the respondent's reasons against the appeal, or that the appellants have been misled, and were induced by the acts of the respondent to suppose the case would be met on its merits.

In *Re Freeman, Cragie, and Proudfoot*, 2 E. & A. Rep. 109, it was argued, and the Court held, that the order appealed from was not an appealable order. It was urged by the appellants that this was an objection which should have been taken by an application to quash the proceedings; but the Court held that it might be taken when the matter was called on for argument, without any preliminary petition, and although the proceedings were there quashed simply for want of jurisdiction, on the ground that the matter was not an appealable one, the appeal was dismissed with costs.

This seems an express authority for allowing the costs in the present case, the proceedings being quashed as the appeal is brought on too late.

The appellants might have applied to the Court last June for an extension of time, and, the application being refused, have saved themselves the costs of the further proceedings taken by them, but they refrained from this course, and proceeded upon the assumption that the Court would have granted an application, which it turns out they refused. It was not, however, for the respondent to take for granted that this would be the result of the appellants' motion for an extension of time. If it had succeeded, he would have been obliged at once to have proceeded with the argument of the cause; he was, therefore, bound to be prepared, and to have his counsel instructed; and it seems to follow that the appellants must bear the expense of the course of proceedings which they themselves have chosen to adopt, in place of the less costly one of applying at an earlier stage of the cause.

Nor can it be said here that the notice of the argument of the case should be returned as at law when there is some irregularity, the simple answer being, "I am perfectly regular, as the statute says the Court to which I am going

can enlarge the time for hearing, and to that Court, when my cause is called on, I will make the application which the statute justifies." There was not, therefore, any irregularity on the part of the appellants.

It was the duty of the respondent to have prepared and furnished reasons against the appeal, as from the case of *Clyne v. Clyne*, McL. & Rob. 115, it would seem that costs will not be given to a respondent who omits to answer the appeal even although the appeal be dismissed.

It would have been more satisfactory if the objection upon which the respondent succeeds had been taken in his reasons against the appeal, but as it is clear the appellants have not been misled by this omission, we do not think the want of this ground of appeal is a sufficient reason for depriving him of the costs of the appeal.

We think the motion and appeal should be dismissed with costs.

Motion and appeal dismissed with costs.

PALMER (Plaintiff in the Court below), *Respondent v.*
M'LENNAN ET AL. (Defendants in the Court below),
Appellants.

Promissory note—Instrument not amounting to—Account stated—Evidence of.

Held, (affirming the judgment of the Court of Common Pleas, *ante* page 258), WILSON, J., dissenting, that an instrument in this form, "Good to Mr. Palmer for \$850 on demand," was not a promissory note, and so requiring a stamp; but, GWYNNE, J., dissenting, that without any evidence of the circumstances under which it was given, it was *prima facie* evidence to go to a jury of an account stated.

APPEAL from the judgment of the Court of Common Pleas,—reported *ante*, page 258. (*a*).

This action was brought by the respondent against the appellants as executors of Duncan McLennan deceased, who was executor of Donald Campbell deceased. The declara-

(*a*) Argued 6th of January, 1873, before DRAPER, C. J., of Appeal, RICHARDS, C. J., SPEAGGE, C., HAGARTY, C. J., C. P., WILSON, J., GWYNNE, J., GALT, J., STRONG, J. V. C., BLAKE, V. C.

tion claimed among other demands, for "money found to be due from the said Donald Campbell to the plaintiff," (the respondent) "on accounts stated between the plaintiff and the said Donald Campbell." The only plea material to be noticed, was never indebted.

There was no other evidence than a paper, admitted to be in the handwriting of the testator, Donald Campbell, as follows: "Good to Mr. Palmer for Eight hundred and fifty dollars, on demand, 10th November, 1866. D. CAMPBELL."

A verdict was rendered for the respondent, with leave reserved for the appellants to move to set it aside, and enter a verdict for themselves, on the following objections: 1st. That the document was a promissory note, or an instrument requiring a stamp. 2nd. That there was no evidence of an account stated, or of prior accounts and transactions between the parties. 3rd. That the mere production of the instrument was insufficient to entitle the plaintiff to recover as upon an account stated.

A rule *nisi* was accordingly obtained from the Court of Common Pleas, and, after argument, was discharged. This appeal is against the decision on this rule.

Harrison, Q. C., for the appellants. The document sued upon, is a promissory note, and not being stamped is void. *McKay v. Grinley*, 30 U. C. R. 54, shows that an unstamped note is not evidence of an account stated; it can have no effect. See also *Ritchie v. Prout*, 16 C. P. 426, where it was held that an unstamped note could not be received in evidence. If then this be a promissory note, and not stamped, the plaintiff must be nonsuited. It has been held in England, that a mere I. O. U. is not a promissory note, for there is no promise to pay either express or implied; but the instrument in this case is more—"Good to Mr. Palmer for \$850 on demand," means *to be paid or payable on demand*, and these words must be implied. No form of words is necessary to constitute a promissory note; and here we have everything which in *Byles on Bills*, 10th ed., p. 6, is specified as necessary to constitute a note. In *Ellis v. Mason*,

7 Dowl. 598, it was held, that the promise may be supplied. See also *Franklin v. March*, 6 New Hamp. 364. The American cases hold that we may imply a promise from the acknowledgement of indebtedness: *Cummings v. Freeman*, 2 Humphreys 143; *Marrigan v. Page*, 4 Humphreys 247. The English cases do not go so far, but we have in this instrument sufficient to supply the promise. The following cases show what have been decided not to be promissory notes: *Fisher v. Leslie*, 1 Esp. 426; *Israel v. Israel*, 1 Camp. 499; *Horne v. Redfearn*, 4 Bing. N. C. 433; *White v. North*, 3 Ex. 689; *Robins v. May*, 11 Ad. & E. 213; *Sibree v. Tripp*, 15 M. & W. 23; *Melanotte v. Teasdale*, 13 M. & W. 216; *Moffat v. Edwards*, 1 C. & M. 16; *Smith v. Smith*, 1 F. & F. 539; *Taylor v. Steele*, 16 M. & W. 665; *Gould v. Coombs*, 1 C. B. 543. This, it is submitted, is a promissory note, whether we read the instrument as having the words, "good," "payable," or, "to be paid."

The American cases seem more reasonable than the English cases; but even in England they have held instruments less formal than the present one to be promissory notes: *Morris v. Lee*, 2 Lord Raym. 1396; *Chadwick v. Allen*, 2 Str. 706; *Green v. Davies*, 4 B. & C. 235; *Brooks v. Elkins*, 2 M. & W. 74; *Waithman v. Elsee*, 1 C. & K. 35; *Shenton v. James*, 1 C. & K. 136; *Ellis v. Mason*, 7 Dowl. 598. No case has been found which decides that "payable," or, "to be paid," are essential to the validity of a promissory note. Nobody would dispute that if these words were inserted, the instrument would be a note.

2. The document, if not a promissory note, is not *per se* evidence of an account stated. There must be evidence not only of the document itself, but also of a prior accounting. See *Clarke v. Webb*, 1 C. M. & R. 29, where it was held that a special agreement to pay a sum of money, cannot be converted into an account stated. In order to recover on an account stated, it ought to appear that the account sued upon was stated with reference to former transactions be-

tween the parties. See also *Lemere v. Elliott*, 6 H. & N. 656, where the rule is laid down, that to support an account stated there must be an admission of a debt due.

The meaning of "good on demand," has not been legally defined; whereas, "I. O. U." has : *Lemere v. Elliott*, 6 H. & N. 656 ; before referred to ; *Douglas v. Holme*, 12 A. & E. 641 ; *Gould v. Coombs*, 1 C. B. 543, before referred to. In *Buck v. Hurst*, L. R., 1 C. P. 297, an "I. O. U." was held to be evidence of money lent, but no case goes to show that a similar interpretation should be given to an instrument like the present one. In *Reed v. Reed*, 11 U. C. R. 26, and in *Tyke v. Cosford*, 14 C. P. 67, the Court did not hold that the instrument itself was evidence of an account stated, for there was evidence given of previous dealings. See also *Curtis v. Rickards*, 1 M. & G. 46. The tendency of the Court is not to extend what they call this slovenly doctrine of accounting. *Ex parte Toppiny*, 34 L. J. Bank. 44.

S. Richards, Q. C., for respondent. The plaintiff was entitled to recover on the count for an account stated. An I. O. U. is *prima facie* evidence of an account stated, and it is not only evidence for the party to whom it is addressed, but its mere production makes it evidence for the party producing it, though not addressed : *Byles on Bills*, 10th ed., 28 ; *Curtis v. Rickards*, 1 M. & G. 46 ; *Fesenmayer v. Adcock*, 16 M. & W. 449. A simple promise to pay a sum of money, if unexplained and uncontradicted, is also evidence of an account stated : *Davies v. Wilkinson*, 10 A. & E. 98. But if explained and shown that no debt exists, the promise will not avail : *Petch v. Lyon*, 9 Q. B. 147 ; *Lubbock v. Tribe*, 3 M. & W. 607 ; *Toms v. Sills*, 29 U. C. R. 497. And the same as to an I. O. U. : *Lemere v. Elliott*, 6 H. & N. 656.

The present instrument must have an effect at least equal to an I. O. U. It in fact goes further, and not only implies that the amount is owing, but also purports to be a voucher or certificate that it is "good to" or will avail to the testator for the amount stated, though in what way it is to

avail is not expressed. There seems to be no case exactly in point in our own Courts. In *Tyke v. Cosford*, 14 C. P. 64, the Court apparently considered the words, "good to you," as equivalent to the words, "I owe you." In *Brown v. Gilman*, 13 Mass. 157, an instrument in the words, "Good for \$126 on demand," was held not a promissory note, (no payee being named); but evidence on the common counts in favour of the party producing it.

2. The instrument is not a promissory note, and is therefore good without a stamp. A mere "I. O. U." does not require a stamp: *Melanotte v. Teasdale*, 13 M. & W. 216; *Smith v. Smith*, 1 F. & F. 539. There are no doubt American decisions which would constitute the instrument a promissory note: *Cummings v. Freeman*, 2 Humphreys 143; *Harrow v. Dugan*, 6 Dana 341. See also *Marrigan v. Page*, 4 Humphreys 247; *Russell v. Whipple*, 2 Cowan 536; *Sackett v. Spencer*, 29 Barbour 180; *Kimball v. Huntington*, 10 Wendell 675. These cases all proceed on the ground that the *acknowledgment of indebtedness* on the face of the instrument *implied* a promise to pay, and that such *implied promise* was sufficient to make the instrument a note. But the English cases require that the promise, or words from which a promise to pay can be collected, should be expressed on the face of the instrument; an implied promise is not sufficient. See *Horne v. Redfearn*, 4 Bing. N. C. 433; *Sibree v. Tripp*, 15 M. & W. 23; *Taylor v. Steele*, 16 M. & W. 665. The cases of *Gould v. Coombs*, 1 C. B. 543; *Melanotte v. Teasdale*, 13 M. & W. 216, and *Cory v. Davis*, 14 C. B. N. S. 370, are to a similar effect. If the words "payable," or "to be paid," had been inserted in the present instrument, it would probably have amounted to a promissory note: *Brooks v. Elkins*, 2 M. & W. 74. The words, "on demand," do not avail to make the instrument a note; it would have the same effect without those words as with them; no demand would be necessary in either case. A note in which no time of payment is mentioned, is payable on demand: *Byles on Bills*, 10th ed., 210;

Bayley on Bills, 6th ed., 115; *Whitlock v. Underwood*, 2 B. & C. 157. And a demand is not necessary to charge a maker though the note be payable on demand: *Byles* on Bills, 10th ed., 215; *Frampton v. Coulson*, 1 Wils. 33; *Norton v. Ellam*, 2 M. & W. 461.

Harrison, Q. C., in reply. It may be admitted that a mere I. O. U. is not a promissory note, but this is something more; and in England it would require a stamp; *Dixon v. Chambers*, 1 C. M. & R. 845. As to meaning of "Bon," See Robertson's L. C. Digest, 41, citing *Hall v. Bradbury*, in App. 1 Law Review 180.

January, 18th, 1873.—DRAPER, C. J., OF APPEAL (a)—I have not found any case in which a decision has been given in England, or our own Courts, on a writing similar to this now before us. Substitute I. O. U., for the words "Good to," and the cases are numerous, and the law well settled. It has acquired its name from the three letters I. O. U. Custom, commencing I have not discovered when, has interpreted these letters as meaning and equivalent to words, "I owe you." The sound gives the sense. Whether the origin was in gambling, or in transactions between borrower and lender, I have not traced. But it has been recognized as an instrument of evidence, and the following points have been decided with respect to it. It is a mere acknowledgment of a debt, and is not negotiable. It ought regularly to contain a date, the sum acknowledged, the name of the creditor, and the signature of the debtor. The want of a date, or the absence of the creditor's name, will not render it invalid. Drawn thus, it requires no stamp.

But if it contains words amounting to a promise to pay the money, it must be stamped as a promissory note, or as an agreement, if terms of agreement be introduced into it. It is evidence of an account stated, and though it do not contain the creditor's name, it is *prima facie* evidence (liable to be rebutted),* for him who produces it. See *Chitty* on Bills, 10th ed., 357.

(a) *Present*—DRAPER, C. J., of Appeal; RICHARDS, C. J., HAGARTY, C. J. C. P., WILSON, J., STRONG, V. C., BLAKE, V. C.

The custom of using three letters for three words corresponding in sound, has been sanctioned by the Courts by these decisions. Can it not be said that instruments such as that given in evidence in this case, should be recognized as commonly used as acknowledgments of indebtedness; or do the words themselves, in order to give them any effect whatever, import and admit such an acknowledgement?

It appears to me, that it would be not only trifling with common sense as well as with principle, to say that, "Good to A. B. for \$150 on demand," means Good for nothing in law. The parties could not have intended that, and their intention, if it can be ascertained upon a reasonable construction of their language, should prevail, as where a note was worded, "Borrowed of J. S. fifty pounds, which I promise never to pay"; it was decided that the word "*never*," might be rejected, or read as "*ever*."

I have met with no English case in which a construction has been put on an instrument similar in language to that now before us. There are American cases upon the point, which were referred to in the judgment in the Court below; but we cannot follow them as authority—though we often derive advantage from the sound reasoning and ability in them, and they deal with many matters common to us, which rarely if ever come in question in England.

As a matter of fact, this sort of instrument, usually called "*bons*," are common enough among us. The name, which is French, is, among other meanings, a commercial term, signifying according to the *Dictionnaire de l'Academie*, "*l'acceptation d'un banquier*," "a banker's acceptance;" and we have introduced not the name merely, but its principal phrase or expression, and its use as an instrument of commerce, from the intercourse between this and the adjoining Province of Quebec, where a majority of the people speak French, and until of late years French only. The commercial intercourse between the two Provinces will readily account for our adopting a convenient form in which to acknowledge an indebtedness, and translating its leading word into our language.

But without resting upon that or the American cases—some of which would lead to the conclusion that the document in question amounts to a promissory note, (in which I do not concur)—I think that the intent of the signer of it must, at the lowest, be held to have been to confer some benefit or advantage to the party named in it. Is not such an intent deducible from its words? As an acknowledgment that the signer of it owed to the respondent the sum named to him, and that he, the signer, was liable to be called upon at any moment to pay it, it would be of good to him, as an admission, without other proof. There is no set form of words necessary to constitute an acknowledgment, any more than there is to create a promissory note; and this construction does no violence to the language, and is in entire accord with the presumed intention. But if it be treated as having the same effect as an I. O. U., that is, a mere acknowledgment of a debt—differing in language but agreeing in effect in its principal object,—I feel no difficulty in applying to it the same rules and consequences as govern or attend an I. O. U. And I agree fully that it requires no stamp, and was properly received in evidence, and was sufficient to sustain a verdict for the respondent on the account stated.

I think the appeal should be dismissed with costs.

WILSON, J.—The meaning of the instrument in question is, that the money is good to Mr. Palmer on demand. That imports an *obligation* to pay it not a mere memorandum that he can have so much money, if or when he wants it.

“A promise to be accountable to A. or order, for £100. value received,” was in *Morris v. Lee*, 2 Lord Raym. 1396, held to be a good promissory note.

It is there said, “Deliver such a sum of money, makes a good bill of exchange.” If so, then “I will deliver,” or “I am to deliver, such a sum,” would be a good promissory note.

In the same case reported in 8 Mod. 362, it is said on p. 364, “I promise that J. S. or order, shall receive £100,” is a good form of note.

In *Chitty* on Bills of Exchange, 10th ed., p. 82, the cases are summed up as follows: "Thus an order or promise 'to deliver money,' or a promise 'that J. S. shall receive money,' or a promise 'to be accountable,' or 'responsible' for it, will be a sufficient bill or note."

So, "I do acknowledge myself to be indebted in £50, to be paid on demand, for value received," was holden to be a good promissory note, because the words *to be paid* amounted to a promise to pay accordingly.

The instrument in question has not been sued on as a promissory note, but has been used as a mere acknowledgment of a debt.

I have no doubt it contains such an acknowledgement.

I think the word *good*, is more comprehensive than the word *owe* in an I. O. U., and than the word *due*, in an instrument "due to A. B." Neither of these words contains a promise to pay, nor amounts to more than a declaration, that the signer of the instrument is indebted to the other in so much money.

The word *good* means more than that.

Credit A. B. or order, with so much *in cash*, will make a good note; *Ellison v. Collingridge*, 9 C. B. 570.

In *Miller v. Thomson*, 3 M. & G. 576, "Six months after date, pay, without acceptance, to the order of J. C. F. £100, value received.

For the Directors.—T. H., *Manager*.

The London Trades' Joint Stock Banking Co., London," was held to be a promissory note, because the whole transaction was by one company. Tindal, C. J., said, page 580, "There is an absence of the circumstance of there being two distinct parties as drawer and drawee, which is essential to the constitution of a bill of exchange. That being so, the only alternative is, that the instrument is a promissory note, and is properly declared upon as such." The rule is, that if an instrument be so ambiguous that it is difficult to say whether it is a bill of exchange, or a promissory note, the holder of it may declare on it, as either the one or the other: *Edis v. Bury*, 6 B. & C. 433; *Lloyd v. Oliver*, 18 Q. B. 471.

I infer from these cases that an instrument expressed as follows, would be a good promissory note: "Pay A. B. or order \$100." See also *Hooper v. Williams*, 2 Ex. 13, 20. And as "Credit in cash;" and "*Deliver and pay*" so much money, are respectively good words of promise to pay that money, it seems to me to follow, that "*Good to A. B. for \$100,*" should be quite a full and effectual a word of promise to pay.

No particular form of words, it is said, is required to be used in order to constitute a valid note; and the observations of Parke, B., in *Hooper v. Williams*, 2 Ex. 13, upon a note made payable to the maker's own order, may be applied to some extent here. He said, p. 21, "Securities in this informal, not to say absurd form, are still not invalid; and it might be of much inconvenience if they were, for there is no doubt that this form of note, probably introduced long after the Statute of Anne, and for what good reason no one can tell, has become of late years exceedingly common."

Now, the form of a note such as this is a very common one in this country, and it has been held to be a good form of note in the express case of *Franklin v. March*, 6 New Hamp. 364. The following cases in the United States Courts are not applicable altogether, for they all contain the word *due*, and excepting in the case of *Kimball v. Huntington*, 10 Wendell 675, where the word *payable* is used, none of them are more than an *acknowledgement* of a debt. In *Marrigan v. Page*, 4 Humphreys 247,—“Tennessee, 1843, Due A. B. or order,” &c. In *Kimball v. Huntington*, 10 Wendell 675—“N. Y., 1833, Due A. B., \$325, payable on demand,” &c. In *Harrow v. Dugan*, 6 Dana 341,—“Kentucky, 1836, I have borrowed from A. B. \$136, which money was loaned me, &c., for the benefit of my father.” In *Russell v. Whipple*, 2 Cowen 536—“N. Y., 1824, Due A. B. or bearer, &c., \$200.26, for value received,” &c. In *Sackett v. Spencer*, 29 Barbour 180,—“N. Y., 1851, Due A. B., or bearer, \$340, for value received,” &c. In *Davis v. Allen*, 3 Comstock 168,—“N. Y., 1840, Due A. B.,” &c., doubted if a note.

In my opinion, this particular instrument is a good promissory note.

It is the business of the Courts to adapt their decisions to the wants and progress of society.

This instrument contains the names of a promisor and a promisee, a specific sum of money, which is to be good to the promisee, and which necessarily means that it is to be made good to him by the promisor, and to be made good at a determinate time. What more is there wanting to make it a complete promissory note ?

If it is to be *good*, it is to be *made* good ; and the only way to make it good is to pay it, as the only way to be *accountable* for a particular sum, is to pay it.

It is quite as full a word of promise, as the word "*Deliver to A. B.*," or the words, "*Credit in cash A. B.*," so much money.

The parties, I should say, intended it to be a promissory note ; and Pollock, C. B., said in *Sibree v. Tripp*, 15 M. & W. 23, 29, " It is difficult to lay down a rule which shall be applicable to all cases ; but it seems to me that a *promissory note*, whether referred to in the statute of Anne or in the text-books, means something which the parties *intend* to be a promissory note."

The appellant is, therefore, in my opinion, entitled to succeed ; because the instrument which was produced as an acknowledgment of debt was also a promissory note, and it was not stamped.

RICHARDS, C. J., STRONG, and BLAKE, V.CC., concurred with the Chief Justice of Appeal.

HAGARTY, C. J., C. P., and GWYNNE, J., adhered respectively to the opinions expressed by them in the Court below.

Appeal dismissed with costs.

HILARY TERM, 36 VICTORIA, 1873.

(February 3rd to February 15th.)

Present :

THE HON. JOHN HAWKINS HAGARTY, C.J.
 “ “ JOHN WELLINGTON GWYNNE, J.
 “ “ THOMAS GALT, J.

HARRISON V. PRESTON.

Sale of land—Action for purchase money—Receipt under seal—Estoppel.

Plaintiff in August, 1867, conveyed to defendant certain land, by deed containing a receipt for the purchase money. It appeared, however, that when this conveyance was made, some question being raised as to plaintiff's title, the defendant retained \$100 of the purchase money, and in October following gave the plaintiff the following agreement : “Harriston, Oct. 1st, 1867. Fifteen months after date, I promise to pay to the order of William Harrison, or bearer, the sum of \$100, providing that the title is good, on lots known as Town Hall, Court House, and Fair Ground, situated on the north side of Elora street, for value received,” these being the lots conveyed. Plaintiff sued defendant on this agreement, and on the common counts, to which defendant pleaded payment.

Held, that the plaintiff was estopped by the receipt in the deed, which included this \$100, and that he could not recover.

THIS was an action brought on the following instrument :
 “Harriston Oct. 1st, 1867. Fifteen months after date, I promise to pay to the order of William Harrison or bearer the sum of one hundred dollars, providing that the title is good on lots known as Town Hall, Court House, and Fair Ground, situated in the Village of Harriston on the north side of Elora Street, for value received.”

The first two counts of the declaration were on this agreement. The third count was for money payable by the defendant to the plaintiff for lands sold to him. The fourth count was for money had and received.

The pleas were 1st, to the first count: did not promise. 2nd, to the first count: that the plaintiff did not convey to the defendant a good title. 3rd, to the second count: did not promise. 4th, to the second count: that the plaintiff did not convey a good title. 5th, to the third and fourth counts: never indebted. 6th, to the whole declaration: payment.

The case was tried before Morrison, J., without a jury at Guelph, at the Fall Assizes of 1872.

From the evidence it appeared that the land in question consisted of three town lots in the village of Harriston, and formed part of a grant from The Crown to one Archibald Harrison, who conveyed them to the plaintiff on the 26th January, 1866. The plaintiff conveyed them to the defendant on the 16th August, 1867, who afterwards, on the 29th April, 1871, conveyed them to one Lang, who at the time of the trial was in possession and living upon them.

From a similarity in the surnames of the patentee and the plaintiff, there was some little confusion in the evidence, but from an examination of the dates mentioned by the witnesses it appeared that before the patentee sold to the plaintiff, about the year 1860, he allowed the municipality to occupy these lots as a fair ground in consideration of their fencing the lots. This arrangement was verbal, and was to continue for four years. This license must therefore have expired before the conveyance to the plaintiff.

When the conveyance was made to the defendant, he did not pay the whole of the consideration money, but retained \$100; some question having been raised about the right of the plaintiff to this fair ground. The deed was dated in August, 1867, and acknowledged payment of the consideration money, and in October following the defendant gave the memorandum already mentioned to the plaintiff, being for the \$100 retained as before mentioned.

The defendant was not nor had his assignee been in any way interfered with in the enjoyment of the premises.

At the conclusion of the case, the learned Judge expressed his opinion that the plaintiff was not entitled to recover on the instrument, nor on the count for the lands sold ; but he directed a verdict for the plaintiff on the second and fourth issues, and for the defendant on the others ; with leave to both parties to move.

In Michaelmas Term, *S. Richards*, Q. C., for the plaintiff obtained a rule calling upon the defendant to shew cause why the verdict should not be entered for the plaintiff on the issues found for the defendant on the 1st, 3rd, 5th, and 6th pleas, pursuant to leave reserved ; or why the verdict on the said issues should not be set aside, and a new trial had on the ground of the verdict being against law and evidence, and for misdirection of the learned Judge in ruling that the defendant was entitled to a verdict on said issues ; or why the plaintiff should not have leave to amend the declaration to suit the evidence at the trial.

Robinson, Q. C., for defendant, obtained a cross rule, calling on the plaintiff to shew cause why the verdict for him on the second and fourth issues should not be set aside, and a verdict entered for the defendant on those issues, pursuant to leave reserved at the trial ; or for a new trial, and on other grounds.

In this term the rules were argued.

Robinson, Q. C., shewed cause. The plaintiff cannot recover the amount claimed in this action, namely, \$100, for he has given a receipt under seal for the purchase money, of which this forms a part, and he is therefore estopped : *Casey v. McCall*, 19 C. P. 90 ; *Sparling v. Savage*, 25 U. C. R. 259 ; and *Ketchum v. Smith*, 20 U. C. R. 313, are expressly in point.

S. Richards, Q. C., contra. The receipt under seal does not bar the plaintiff in this action, the agreement being collateral to the deed : namely, that in case the plaintiff would guarantee the defendant a good title, the defendant

would pay him \$100; *Morgan v. Griffith*, L. R. 6 Ex. 70.

The argument on the defendant's rule is omitted, as the judgment does not proceed upon it.

GALT, J.—I regret to say that I fear the plaintiff is without remedy in this Court. The cases of *Sparling v. Savage* (25 U. C. R. 259); and *Casey v. McCall* (19 C. P. 90) are express authorities against him.

The case of *Morgan v. Griffith*, L. R. 6 Ex. 70, cited by Mr. Richards, does not apply to this case. There the variation proposed to be shewn was something collateral to the lease; here there is no doubt that the money sought to be recovered forms part of the original consideration, the receipt whereof is acknowledged under seal.

Both rules will therefore be discharged, the plaintiff's with, and the defendant's without costs.

I cannot see what amendment could be made that would enable the plaintiff to recover.

HAGARTY, C. J.—The result of all argument is, that the promise was merely to pay the balance of the consideration money mentioned in the conveyance, and thereby admitted to be paid. There is no fresh consideration. We cannot break through the established rules of legal decision, and make what I think would be a new precedent.

It is to be regretted that this litigation should be so useless. The amount at stake is small, and the loss to the plaintiff is wholly caused by his persisting to bring and to try his case before the wrong tribunal. The adjudged cases in those Courts might have been considered.

GWYNNE, J., concurred.

Both rules discharged, plaintiff's with, and defendant's without costs.

HUMPHREY V. WAIT.

Rooms let out to lodgers—Defective passage—Liability of owner.

Defendant, the owner of a house, leased to the plaintiff a room in it, the only mode of access to which, and to the other rooms on the same story, was by a certain passage, in which there was an uncovered stove pipe hole. The plaintiff having agreed with the defendant to change into an adjoining room, was in the act of moving her furniture, when she slipped into this hole and was injured.

Held, that the defendant was not liable, for in the absence of express contract he was under no legal obligation to keep the premises in repair. The plaintiff was aware of the existence of this hole when she took the room. *Quære*.—Whether such knowledge, and her omission to cover it, was not evidence of contributory negligence which would have prevented her recovery.

THIS was an action tried before Richards, C. J., and a jury, at Toronto, at the Fall Assizes of 1872.

The declaration was, for that the defendant was in possession of a house, the rooms whereof were let by him to lodgers, and of a certain passage through the said house, necessary for the use of lodgers, to whom certain of the rooms were let, which passage was the usual, ordinary, and only means of ingress and egress from the said rooms; and the defendant had let one of the said rooms to the plaintiff from week to week, and at a weekly rental, and the plaintiff thereupon became and was a lodger therein, entitled to use and accustomed to use the said passage for purposes of ingress and egress to and from the said room so let to her, and it thereupon became and was the duty of the defendant to keep the said passage in a proper and fit state of repair, so as to prevent accident or injury to lodgers using the same; yet the defendant wrongfully and negligently permitted a certain stove pipe hole then being in and on the floor of the said passage to be and remain open and uncovered, or improperly secured, although notified to have the same covered; and the plaintiff, while she was such lodger, and lawfully and necessarily passing along the said passage to her said room, by reason of the said negligence and improper conduct of the defendant, fell through and into the aperture and hole caused by the said stove pipe hole being and

remaining open and uncovered, whereby the plaintiff sustained injury.

The only plea was not guilty.

The evidence shewed that in the beginning of April last, the plaintiff rented a room in a house which was held by, but was not in the personal occupation of the defendant, who lived in an adjoining house: that in the passage leading to this and other rooms on the same story there was a stove pipe hole which was uncovered (this latter point was disputed at the trial), at the time when the plaintiff took the room: that after the plaintiff had occupied that room for a week or two, she agreed with the defendant for another room which adjoined it, and while moving her furniture from one room to the other, about seven o'clock in the evening, she unfortunately put one of her legs though the stove pipe hole and was injured.

At the close of the plaintiff's case the learned counsel for the defendant moved for a non suit, on the grounds: 1st, that the plaintiff had been guilty of contributory negligence; and, 2nd, that in the absence of any covenant to repair, the landlord was not bound so to do by merely renting apartments to lodgers.

The learned Judge over-ruled these objections, but reserved leave to the defendant to move on the second.

The defendant then adduced evidence in contradiction of some of the statements made by the plaintiff, but it is unnecessary to refer to it as the judgment is not affected by it.

At the close of the whole case the learned Chief Justice directed the jury, that for the purposes of that trial he would hold the defendant bound to have repaired the passage, and that he was liable to the plaintiff, unless the accident had occurred through the contributory negligence of the plaintiff.

The jury found for the plaintiff.

In Michaelmas Term, *McMichael*, Q. C., obtained a *rule nisi* to enter a non suit, pursuant to the leave reserved; or for a new trial, on various grounds.

In Hilary Term, *Harrison*, Q. C., showed cause. It will be contended for defendant that this is a case of landlord and tenant, but it is more like the case of the owner of a private way, and messuages adjoining it, who lets the messuages with the right to use the way. As between Landlord and Tenant, it is admitted there is no liability: *Gott et al. v. Gandy*, 2, E. & B., 845, where it was held that "no obligation to do substantial repairs on notice, is implied by law from the relation of Landlord and Tenant." Now, in the ordinary case of Landlord and Tenant, the tenant occupies the whole of the premises; here the plaintiff occupied only a part, namely, a room off a certain passage, with a right of way over the passage for ingress and egress, and it was the duty of the owner to keep this passage in a proper state of repair: *Rider v. Smith*, 3 T. R. 766; *Duncan v. Louch*, 6 Q. B. 904; *Corby v. Hill*, 4 C. B., N. S. 556; *Shoebottom v. Egerton, et al.* 18 L. T. N. S. 364. The general rule is thus laid down in *Saunders on Negligence*, 75. "It is the duty of every one who has premises to which others may lawfully resort, to exercise all reasonable care against the occurrence of accidents;" and this rule is borne out by the decisions: *Nicholson v. The Lancashire and Yorkshire Railway Company*, 3 H. & C. 534; *Picard v. Smith*, 10 C. B., N. S. 470. There are two exceptions to it. 1st, in the case of Master and Servant, where it is held that the master is not, in general, responsible for any injury sustained by the servant, whether occasioned by the negligence of a fellow servant or from defective machinery, provided the master has used due care in selecting competent men, and employing proper machinery: *Holmes v. Clarke*, 6 H. & N. 349; *Britton v. Great Western Cotton Company*, L. R. 7 Ex. 130. 2nd, when the person receiving damage is a mere visiter; there is no liability: *Southcote v. Stanley*, 1 H. & N. 247. These are the only exceptions; but when persons resort to the premises in the course of business, upon the invitation of the owner, either express or implied, and through his negligence an accident occurs, he is liable: *Indermaur v. Dames*, L. R. 1 C. P. 274, S. C. in App., L.

R., 2 C. P. 311. No case has been found exactly like the present. But *Taylor v. The Peninsular and Oriental Steam Navigation Company*, 21 L. T. N. S. 442, is strongly in favor of the plaintiff. There the plaintiff, being a passenger on a steamboat, on going to his berth fell through an opening in the saloon, which had been left unguarded, and the steamboat company was held liable. As to the question of contributory negligence, the plaintiff had a perfect right to do what she did, and there was no negligence on her part. The evidence, however, shows that she called the defendant's attention to the hole in the spring, when he promised to attend to it: *Wilkinson v. Fairrie*, 1 H. & C. 633; *Clayards v. Dethick*, 12 Q. B. 439; *Indermaur v. Dames*, L. R. 1 C. P. 274, S. C. in App., L. R., 2 C. P. 311; *Britton v. Great Western Cotton Company*, L. R. 7 Ex. 130.

McMichael, Q. C., contra. It has been argued that this was a private way, and that through the non-repair the accident happened; but if this be so, defendant is not liable. In *Pomfret v. Ricroft*, 1 Wms. Saund, (ed. 1870), 557, it was held that if one grant a way over his land he shall not be bound to repair it; but if he voluntarily stop it an action lies against him for the misfeasance, but for the non-feasance no action lies. This case also lays down the principle that the duty of repairing a private way is cast upon the grantee of it, for he that has the use of a thing ought to repair it. This case is decisive against the plaintiff, and it has been followed in all the subsequent cases. In *Taylor v. Whitehead*, 2 Doug. 745; it was held not a good justification in trespass, that the defendant had a right of way over part of the plaintiff's land, and that he had gone upon the adjoining land, because the way was impassable from being overflowed by a river, the ground being that there was no obligation on the grantor to keep the way in repair, but if the grantee wanted to use it he should repair it himself. In *Gale on Easements*, 4th ed., 473; and in *Addison on Torts*, 4th ed., 143, this same doctrine is laid down, and these

cases cited: see also *Gerrard v. Cooke*, 2 N. R. 109. The class of cases referred to on the other side are explained in *Hounsell v. Smyth*, 7 C. B. N. S. 731; namely, that an inducement was held out to the parties to use the way, or an invitation, either express or implied, to come on the premises where the accident happened; as, for instance, where a merchant leaves a trap door open, and a customer coming in falls through it and is injured. They do not apply here, for it was the duty of each of the tenants to keep this hole covered, upon the principle that he who has the use of a thing must keep it in repair; and in the absence of express contract, no duty was cast upon defendant. As to contributory negligence, the plaintiff knew that the hole was there, and she should have taken care to avoid it, or should have seen that it was covered before she commenced moving her furniture: *Southcote v. Stanley*, 1 H. & N. 247; *Wilkinson v. Fairrie*, 1 H. & C. 633.

GALT, J.—It was admitted by the learned counsel for the plaintiffs that this case cannot be supported on the obligation of the defendant arising only from the relation of landlord and tenant, and this seems expressly decided by the case of *Gott et al v. Gandy*, 2 E. & B. 845. Lord Campbell in his judgment says, p. 847, “I am of opinion that this declaration is bad in substance. Unless the declaration shows a state of things from which the law implies a duty to do those things, which the defendant has not done, the general allegation, ‘the defendant not regarding his duty,’ &c., goes for nothing. Now let us see what are the facts alleged. They are these: the defendant was landlord of premises which were let to the plaintiffs from year to year: during the tenancy the premises were in a dangerous state for want of substantial repairs: the defendant had notice from the plaintiffs, and was requested to repair them, and did not do so. Whence does the legal duty to repair these premises on request arise? There is no allegation of any contract to do

substantial repairs. It lies therefore on the counsel of the plaintiffs, who are actors, to establish on authority or on principle, that this obligation results from the relation of landlord and tenant. Mr. *Russell* can produce no authority in his favour, not even a dictum. And I have heard no legal principle from which it would follow that the landlord was bound to repair the premises. It is clear to my mind that, though, in the absence of an express contract, a tenant from year to year is not bound to do substantial repairs, yet, in the absence of an express contract, he has no right to compel his landlord to do them."

See also *Woodfall* on Landlord and Tenant, 10th ed., p. 493, in which he states, "There is never any covenant or promise *implied by law* on the part of the lessor of a house or land that it is reasonably fit for habitation, occupation, or cultivation: nor that it is fit for the purposes for which it is let: nor that the house will endure during the term: nor that the lessor will do any repairs whatever."

The want of authority in *Gott et al. v. Gandy*, 2 E. & B. 845, was relied upon by all the learned Judges who decided that case, as a very strong argument against the plaintiffs, and most certainly I have been unable to find any bearing upon the present. It is therefore plain that the plaintiff cannot recover on the relation of landlord and tenant.

The learned counsel for the plaintiff, however, did not rest his argument on that ground, but contended that inasmuch as it was necessary for the plaintiff to use the passage in question, it was the duty of the defendant to see that it was in a proper state of repair, assimilating it to the case of a man who for a valuable consideration has demised a piece of land, the only access to which is across a way belonging to the lessor, and which he contended the lessor was bound to keep in repair, and who was, as he contended, responsible for damages to his tenant, if he sustained an injury arising from such neglect.

I am not prepared to assent to this proposition as regards this case, as from the evidence given at the trial it appears

that the plaintiff at the time when she first took a room from the defendant was aware of the existence of the stove-pipe hole. She says, "When I went to take the room, I pointed to the stove-pipe hole in the hall near the door of the room, and said that looked very dangerous; he said, (before I engaged to rent the room,) he would have it covered up." This statement so far as promising to cover the stove-pipe hole is expressly denied by the defendant, and the question was not submitted to the jury, as the learned Judge directed them that the defendant was liable for the want of repair.

The case then presents this view: the plaintiff was tenant to the defendant of a room, the approach to which was unsafe to the plaintiff's own knowledge, and she suffered injury in consequence of this very defect. It has been already shewn that the defendant is not liable merely because he was the landlord. Is he then liable by reason of any other relation between the parties?

In all the cases referred to by Mr. Harrison, in which the plaintiff was held entitled to recover, there was some obstruction placed or act done by the defendant, of which the plaintiff was ignorant; here there was nothing done, and the plaintiff was aware of the defect.

Having arrived at this conclusion, it is unnecessary to consider the other questions raised by the rule, but we are of opinion that it would have been difficult to uphold the present verdict on the objection taken to the evidence, as shewing contributory negligence in the plaintiff. A mere statement of the facts is sufficient to shew this. The plaintiff knew of the existence of the danger, and she in the dusk of an April evening undertook to move her furniture along the passage, without taking the slightest precaution to guard against a defect which could have been remedied without any trouble or expense on her part. Under these circumstances, we think there may be good ground for urging that it was the negligence of the plaintiff herself which substantially contributed to the injury.

HAGARTY, C. J.—If the plaintiff had become tenant to the defendant of the whole house, in the absence of express covenant or agreement, it is clear she would have no cause of action against him for non-repair. Her counsel, admitting this principle, seeks to put her claim on a better footing by saying that with the part of the house demised she had also granted to her a right of way over the passages for ingress and egress.

She became tenant of the room while the hole was open in the passage. So long as the landlord did nothing in the way of commission to derogate (as it were) from his own grant, she has, I think, no remedy.

We may concede that he could not place any obstruction on the passage to hinder her use of it; but he was not, I consider, bound to repair or uphold it. It just amounts to this. A man owns a house in an almost ruinous state. Another rents it from him as it stands. The latter has no remedy, and must pay his rent.

So if a man rent the upper story of a house with the staircase—the only means of approach—in a ruinous and unsafe state, I see no implied obligation on the landlord to uphold it, or to answer in damages for an injury resulting from its insecure state.

It would be a singular state of the law, if the landlord would not be answerable if he demised the stairway with the upper story, and would be answerable if he only gave a right to use it, as an approach to the part of the house actually demised.

He will of course be liable for any voluntary obstruction to, or interference with the enjoyment of what he has demised or granted.

As said by Parke, B., in *Harris v. Ryding*, 5 M. & W. 60, at page 71, “It is very like the case of the grant of an upper room in a house, with the reservation by the grantor of a lower room, he undertaking not to do anything which will derogate from the right to occupy the upper room; and if he were to remove the supports of the upper room, he would be liable in an action of covenant; for the grantor

is not entitled to defeat his own act by taking away the under-pinnings from the upper room." But if the under-pinnings gave way from natural decay, I hardly think the grantor would incur any liability.

The law seems to be very clearly stated in *Pomfret v. Ricroft*, 1 Wm's Saunders, (ed. 1870,) p. 557: and the distinction between misfeasance and nonfeasance fully marked.

This case is widely distinguishable from a class of cases of parties inviting customers into their premises, where there may be some dangerous pitfall or open cellar, &c.; or where people are injured by the defective or dangerous state of the approaches to railway stations, along which the public are obliged to pass who use the road. *Indermaur v. Dames*, L. R. 1 C. P. 274; S. C. in App., L. R. 2 C. P. 311, already cited, discusses the law on this head.

The case before us is not one of much merit as against the defendant. A stove hole in a passage is known to be uncovered, yet neither the plaintiff nor any other under-tenant would take the trifling trouble of placing a small piece of board over it, and in preference to this very small exertion, will rely on an action against the landlord, on an alleged breach of duty on his part. As laid down in *Pomfret v. Ricroft*, 1 Wms. Saund. (ed. 1870), 557, at page 567, "When the use of a thing is granted, every thing is granted by which the grantee may have and enjoy such use." And so the plaintiff, (assuming her to be, as Mr. Harrison, argued, the grantee of the right of way) could have done the necessary repairs herself, if we can dignify an act so trifling with the name of repairs. The case of *Sullivan v. Waters*, 14 Ir. C. L. R. 460, contains a valuable summary of the law on the nature of claims like that in *Indermaur v. Dames*, L. R. 1 C. P. 274; S. C. in App. L. R. 2 C. P. 311.

GWYNNE, J., concurred.

Rule absolute to enter nonsuit.

COWIE, V. APPS.

Commission merchants—Advances on goods consigned for sale—Right to recover.

The defendant, at Brantford, consigned for sale to the plaintiff, a commission merchant, at Montreal, a lot of butter for sale, and drew upon him at five days for \$2000, which the plaintiff accepted, and paid at maturity. At that time his instructions were, not to sell for less than 18½c. per lb., which he could not get. The market continued to fall, and after a lengthy correspondence the butter was sent to plaintiff's agents at Halifax, who wrote that no sale could be effected there, and advising Jamaica. Plaintiff then sued the defendant upon the common counts for the money paid by him.

Held, that he was entitled to recover, and that there was nothing in the facts, more fully set out below, to vary the common law obligation to refund the advance on request, or to compel the plaintiff to wait until a sale should be effected.

At the trial, defendant tendered evidence to shew the meaning of cash advances made by commission merchants on account of goods consigned to them for sale, and the usual practice as to commission merchants reimbursing themselves for such advances.

Held, that such evidence was properly rejected.

DECLARATION on the common money counts.

Pleas,—Never indebted, and set-off.

Issue.

The cause was tried in the fall of 1872, at Brantford, before Morrison, J.

From the evidence given at the trial it appeared that the defendant at Brantford, on the 11th November, 1871, consigned to the plaintiff, a commission merchant in Montreal, in the care of the Bank of British North America, 184 kegs of butter for sale.

By letter of November 14th, 1871, the defendant informed the plaintiff thereof, and that he had drawn on it for \$2000 at five days. He said, "The time is short, as I do not suppose the butter will reach you in that time, but the agent of the bank here said it made no difference. If you do not wish to accept at so short a date, have it sent back unprotested if possible. You will please let me know the best offers you can get for the butter before you sell."

On the 17th November the plaintiff replied: "Your draft for \$2000 was duly honoured, and butter will receive my

best attention. You should, however, put me in a position to close with an offer when I get it, as buyers are not always willing to wait for a reply to a message."

About November 21st, the defendant telegraphed that he would sell at $18\frac{1}{2}$ cents: "Do the best you can; submit offers if time permit."

On the 25th November the plaintiff wrote that he could have sold for 18 cents the day it came, but the man would not risk waiting a reply; that he was near accepting the offer, but could not, as the limit was $18\frac{1}{2}$ cents.

On the 27th November the defendant wrote that his instructions were, that he would sell at $18\frac{1}{2}$ cents, but that the plaintiff was to use his own judgment, which did not confine plaintiff strictly to $18\frac{1}{2}$ cents, and if he had closed the sale at 18 cents defendant would have been better satisfied. And he added that he wanted plaintiff to do with it just as if it were his own, and not to miss a good chance to sell.

Many letters passed between the parties.

On the 20th February, 1872, the defendant wrote that he did not know what to do with it; that he supposed there would be a serious loss. He said he did not expect then to get 18 cents. He added, that the plaintiff should submit any offers before selling.

On February 22nd the plaintiff wrote saying he would advise holding; that any sale then would be an immense sacrifice.

On March 19th the defendant wrote suggesting that there was a good demand in the American market, and if the plaintiff could, he hoped he would take advantage of it.

On March 29th the defendant wrote, wishing the plaintiff to do with it as if acting for himself.

On April 18th the defendant suggested Halifax as a market.

On April 24th the defendant again wrote to same effect.

On June 12th the plaintiff wrote that he had shipped the butter to Halifax. He added, "I will be likely short of funds, and may draw on you for \$500, or \$600, or perhaps

\$1000, if I require it. I have carried this advance of \$2000 since November at seven per cent., though I could have lent it out at nine per cent. several times."

On July 11th the plaintiff sent to the defendant letters received from his correspondent at Halifax, and asked the defendant to telegraph what he would like to be done.

These Halifax letters stated that there was no market there, and suggested sending it to Jamaica.

On July 11th defendant telegraphed to the plaintiff in answer, to do as he thought best; that he wanted it disposed of in some market.

It appeared that the plaintiff on June 15th drew on the defendant for \$800, but the draft was returned unaccepted.

On the 19th of July the plaintiff wrote, complaining of this, and asking explanation, and on July 22nd the defendant wrote, that he "cannot accept any draft at present till the produce held by you is disposed of. The butter cost me \$800 more than the amount of the draft made on you last fall, and I do not feel like losing \$1000 on a little lot of butter, which ought to have been disposed of long ago. * * I think if you had tried you could have sold my lot during the winter. You must have known the result of holding till this time against my wishes."

This suit was commenced 24th August, 1872.

The plaintiff was examined. He proved that his Halifax agents had remitted to him a draft for \$1200 on account of the butter, not matured at the time of the trial. He claimed the balance due by the defendant, crediting him with the \$1200. He had also paid freights, insurance, &c., according to a memorandum produced. 50 packages had been sent from Halifax to Jamaica. No returns had then been received. 25 sent to Newfoundland, realising \$299; also another batch of 109 packages, not yet accounted for. He said the present rates for butter would not cover his claim. It would require 20 cents per lb. to cover it.

For the defence *VanNorman* objected that the plaintiff was not entitled to recover; and proposed to prove by witnesses that in a transaction of this sort, in the view

of commercial men, the plaintiff was not entitled to recover. The learned Judge declined to receive such testimony. Also, that as the property had passed out of the hands of the plaintiff, as stated by the witness, the plaintiff could not recover; also, that when advances are made as here, they are made on the understanding that the property has to be disposed of before the party advancing can seek repayment. The learned Judge declined to receive such testimony, and directed a verdict for the plaintiff for \$1076.44, reserving leave to the defendant to move to enter a verdict for him, should the Court be of opinion that he should have entered it for the defendant. The defendant was to have leave to amend his pleas if necessary, and if the verdict for the plaintiff should stand, the defendant might have leave to strike out his plea of set-off.

In Michaelmas Term *VanNorman* obtained a rule on the leave reserved; or to reduce the verdict; or for a new trial for rejection of evidence to shew the meaning of cash advance made by commission merchants on account of goods consigned to them for sale, and what the usual practice of commission merchants is for reimbursing themselves for such advances; and for misdirection, in ruling there was no question of fact for the jury; and on the law, evidence, and weight of evidence.

In this term, *Fitch* shewed cause. The only point is, whether a factormaking advances on goods consigned to him for sale is entitled to recover the same before the sale of the goods. He may sue on the implied contract to repay, and he has a lien on the goods, and it has been expressly decided that he is not bound to postpone his right to repayment until the goods be sold. In *Graham v. Ackroyd*, 10 Hare 192, it was contended that where a factor takes a *del credere* commission, and makes advances, there could be no debt due until all the goods were sold. But it was held that when the factor paid the acceptances which it was the principal's duty to provide for, the principal became

debtor to the factor for the amount paid on his account ; and it makes no difference that the factor had a *del credere* commission. In *Russell* on Factors 163-4, it is laid down that a factor is entitled to be reimbursed for all advances made by him ; but as regards his commission, he must complete the transaction before the right to commission attaches, unless prevented by the principal. It was contended that the plaintiff might have sold the goods, and so recovered the amount of the advance, but he had no such power except at the price named by the defendant, namely, 18½ cents. His instructions were to sell at 18½, adding, "do the best you can," which meant the best over 18½ cents. When, therefore, he received the offer of 18 cents he had no power to accept it, and any subsequent instructions received could not alter his position : *Smart v. Sandars*, 3 C.B. 380 ; S. C. in Error, 5 C. B. 895 ; see also *Smith's Mercantile Law*, 8th ed., 114. The evidence of custom to shew the meaning of cash advances by factors on goods consigned to them for sale, and what the usual practice is for reimbursing themselves for such advances, was properly rejected, and in any case it is not admissable under the plea of "never indebted," but must be specially pleaded : *Torrance v. Hayes*, 2 C. P. 338.

McMichael, Q. C., contra. The contract is to be made out from the letters which passed between the parties, and the fair conclusion from them is, that the plaintiff was intended to reimburse himself out of the proceeds of the goods when sold. Moreover the plaintiff, by sending the goods to his agent at Halifax, and thus putting it out of his power to return them to the defendant, has disabled himself from suing. The same rule applies as between mortgagor and mortgagee. To entitle a mortgagee to sue on the covenant in the mortgage he must be in a position to reconvey the property, and if he has put it out of his power to do so, an action will not lie. It is contended, apparently, for the plaintiff, that a factor has no power of sale except with the consent of the principal, but this is clearly not the law. In *Story* on Sales, 4th ed., p. 93, sec.

98, the law is clearly laid down, that "Where a factor makes advances, or incurs liabilities, upon a consignment of goods, he may sell them, in the exercise of a sound discretion, and according to the general usage, and reimburse himself for all expenses and liabilities out of the proceeds of the sale; and the consignor cannot interfere, unless there be some existing arrangement between himself and the factor, which controls or varies this right."

HAGARTY, C. J., delivered the judgment of the Court.

We can see nothing in the evidence from which it could be inferred that the plaintiff advanced the \$2000 on the draft of the defendant, except on the terms of repayment in the usual manner. As soon as he paid the draft the defendant became his debtor for the amount.

The defendant, doubtless, fully expected that the plaintiff would sell his butter, and pay himself therefrom, and but for the falling market such would have been the result.

But when the plaintiff on the maturity of the draft, November 21st, paid the amount, he was certainly only in a position to sell at a specified price, viz., 18½ cents.

On a fair construction of the letters, it was clearly not till after that date that the defendant gave him full powers; and even on the 20th of February the defendant still tells him to submit any offers before selling.

We think it impossible to hold on this evidence that there was any contract in any way to vary the common obligation to refund the advance on request, or to compel the plaintiff to wait till a sale could be effected.

In a case of *Graham v. Ackroyd* (10 Hare 192) before Sir George James Turner, V. C., it was urged, p. 201, that a factor taking a *del credere* commission has not, in respect of advances made by him, any personal right against his principal until the goods in respect of which the advances have been made are sold, and it is ascertained that the goods are insufficient to meet the advances, and that upon the principal not providing for the acceptances given by the

factor for the goods, the remedy of the latter was in damages.

As to the last point, the Vice Chancellor held, "That when the plaintiffs" (the factors) "paid the acceptances, which it was Rawson's" (the drawer's) "duty to provide for, he became debtor to the plaintiffs" (the acceptors) "for the amount which they paid on his account." As to the point first mentioned, the Vice Chancellor said, "I am aware of no authority for such a position." He says "The general rule of law appears to be, that, where a factor makes advances, he has a personal remedy against the principal as well as lien on the fund. * * No doubt the factor's remedy against the principal may be waived by express or implied agreement."

In *Smart v. Sandars* (3 C. B. 380), S. C., in Error (5 C. B. 895), it was held, after elaborate argument, that when factors were under instructions not to sell under a named price, that when they were under advances and had required the consignors to repay, or that in default they would sell to repay themselves, they still could not do so, their authority to sell not becoming by reason of the unpaid advances irrevocable as an authority coupled with an interest. From a judgment of the Supreme Court of the United States, by Mr. Justice Story, *Brown v. M'Gran* (14 Peters 479), an extract is given, p. 495: "In no case will the factor be at liberty to sell the consignment contrary to the orders of the consignor, although he has made advances, or incurred liabilities thereon, if the consignor stands ready, and offers to reimburse and discharge such advances and liabilities." The whole subject is very fully discussed.

We are of opinion that the present case is free from doubt, and that the plaintiff when he paid the draft on 21st November had an immediate right of action vested in him against the defendant, and so also for his disbursements for freight, &c.

We think the evidence offered, or rather suggested, was rightly rejected by the learned Judge.

The plaintiff had doubtless a lien on the goods for his advances; but he could not sell against his principal's orders, and at all events on the 21st November his hands were tied.

It may be observed that in the defendant's last letter, in which for the first time he complains of plaintiff's proceedings, he does not suggest that there was any contract or understanding between them, that he was not to be liable for advances until the sale of the goods.

If the plaintiff has in any way departed from his duty as the defendant's agent in the matter, he is of course liable therefor, and also must fully account for the result of the sales.

The rule must be discharged.

Rule discharged.

LOCKHART ET AL. V. PANNELL.

Sale of goods—When property passes—Pleading.

On the 27th April, 1872, at a meeting of the creditors of one A. R., deceased, at which his administrator was present, the plaintiffs entered into a written agreement to purchase on behalf of one M. the estate of A. R.; consisting of a stock of goods and other effects. This was signed by a number of the creditors, but not by the administrator, but the administrator at the trial swore that he considered it a sale to the plaintiffs. On the 6th May the plaintiffs sold to defendant this stock of goods, as shewn by the stock book, for the sum of \$7695.24, of which defendant paid in cash \$2782, and received a receipt therefor, on the back of which a memorandum was endorsed, that the balance was to be paid in notes at 3, 6, and 9 months; and defendant was to go on the following morning to Ingersoll, where the goods were, and take possession. On the day of this sale the plaintiffs applied to and obtained from the administrator an order for the delivery of the key of the store in which the goods were on the person who held it, as well as an authority on M's behalf to sell the goods. On the following morning defendant, with one W., who was sent by the plaintiffs to assist, went to Ingersoll, when the defendant took possession, and while engaged in packing the goods up with a view to their removal they were destroyed by fire. M. who resided in Ingersoll, was well aware of the object with which the defendant came there, and at the trial swore that the plaintiffs were authorized to make the sale, and that he had been informed by telegraph of it and did not dissent.

Held, that the evidence clearly shewed that there was a sale by the plaintiffs to defendant so as to pass the property, for even if the plaintiffs had not at the time power to sell, yet the subsequent ratification by the administrator and M. related back so as to make it valid.

It was contended by defendant that the goods were to be checked with the stock book to ascertain the sum for which the notes were to be given. The jury found that this was no part of the bargain; but *semble*, that if it had been the property might still have passed, the checking being required only to ascertain the balance of the purchase money to be paid.

The declaration set out the contract and the terms of payment—namely, part cash and part by notes, at stated dates; and alleged that though defendant had paid the sum payable in cash, he had not paid the balance by his notes or otherwise. *Held* sufficient, it not being necessary to declare specially for the non-delivery of the notes.

THE declaration in this action contained five counts. The first was for the purchase by the defendant from the plaintiffs of a certain stock of dry goods, according to a stock list or invoice that was produced at the time of sale, for a certain sum, on the terms that the said stock of dry goods should be paid for as follows, namely, a portion thereof in cash and the balance by three promissory notes at three,

six, and nine months. It then averred payment of the sum to be paid in cash, and non-payment by the defendant of the balance by his promissory notes, although requested. The second count was the same as the first, differing only by alleging a delivery of the goods. The third count set out the same agreement, but stated the payments to be made at periods of three, six, and nine months, without mentioning promissory notes, and averred that one of the payments was overdue and unpaid. The fourth count was the same as the third, but making delivery a part of the agreement, and averring delivery. Fifth, the common counts.

The pleas were, 1st. Non-assumpsit to the first four counts. 2nd. To the second and fourth counts, non-delivery of the goods. 3rd. To the first four counts, did not agree to pay as alleged. 4th. To the fifth count, never indebted. 5th. To the first and third counts, that it was a condition of the agreement that the goods should be delivered, and traversing the delivery.

The case was tried before Richards, C. J., and a jury (called by him at the request of the defendant), at Toronto, at the Fall Assizes of 1872.

From the evidence it appeared that the goods in question had belonged to the estate of a person named Read, who had carried on business at the Village of Ingersoll, at which place the goods were at the time of the sale. Read had died, and on the 27th April a meeting of his creditors was held in Toronto, at which his administrator was present, when the following agreement was signed by the plaintiffs:—

“We hereby agree to endorse the paper of Alexander Macaulay for the purchase of A. Read’s estate of Ingersoll, Ontario, the purchase to be at the rate of seventy cents in the dollar for the liabilities of the late A. Read, and of the liabilities also of Read & Macaulay, with the proviso and understanding that Alexander Macaulay receive a release in full of all claims against him as partner in the firm of the late business of Read & Macaulay; condition of purchase, notes in three, six, and nine months from first day of June next.

(Signed) LOCKHART & HALDANE.”

Under this agreement there was the following: "We, the undersigned, agree to the conditions as above contained." This was signed by a number of the creditors, but was not signed by the administrator.

John Young Read, the administrator, was examined as a witness, and stated. "I held a stock of goods in Ingersoll. I sold them to Lockhart and Haldane at the third meeting of creditors that was held in my office on 27th April. This memorandum (the agreement above set out) was signed at the time; the stock book was the basis of the sale. I considered the transaction completed with them, and if they had failed in the meantime that the goods would still be theirs; that was at the risk of the creditors, and I acted on their advice."

It was not until the 6th of May that the arrangement was made with the defendant which led to the present litigation. The plaintiffs made a sale, as they contended, to him on that day of the stock of goods as shewn by the stock book, amounting at the price agreed upon to the sum of \$7695.24, and received from him promissory notes for \$2860, which were taken as cash for \$2782, and gave him a receipt therefor, and on the back of this receipt there was the following memorandum, "Balance of purchase to be in notes, at three, six, and nine months." It was at the same time settled that the defendant should go to Ingersoll on the following morning, and and take possession of the goods.

After this arrangement was made, Lockhart went to the administrator to obtain from him an order upon a party of the name of Chadwick for the delivery of the key of the store in Ingersoll, in which the goods then were.

Read, the administrator, further stated, that "on Monday, 6th May, Mr. Lockhart came again, and wanted possession of the stock. I was determined that I would not do anything rashly, and would not give him possession of the place until I saw my solicitor. I saw him on Monday evening, and told him that Mr. Lockhart wanted possession of the stock. I supposed he had guaranteed him imme-

diate possession of the stock. My solicitor went with me to see Mr. Lockhart, and we went then to his solicitor, and after consultation with his solicitor, we signed an agreement, and on that I gave an order on Mr. Chadwick for the key." The agreement was as follows :—

"Toronto, May 6th, 1872. Messrs. Lockhart & Haldane. Toronto, Dear Sirs, You may take possession on Macaulay's behalf of the stock and other assets of Alexander Read, deceased, now in Ingersoll, and sell the same, upon the understanding that you endorse A. Macaulay's notes at three, six, and nine months from 1st June, 1872, for seventy cents on the dollar of all the liabilities of Read & Macaulay and Alexander Read, deceased, as agreed at the meeting of creditors held on 27th April. The sum of \$84 to be retained by me from the money in the bank in Ingersoll belonging to the estate, on account of expenses of administration and stock taking; you also agreeing to get the necessary document (to be approved by your solicitor) signed by A. Macaulay, containing the terms of sale to him.

(Signed)

JOHN Y. READ.

"

LOCKHART & HALDANE."

There was a power of attorney executed by Alexander Macaulay, dated 4th May, 1872, put in at the trial, empowering Lockhart & Haldane to take possession of the estate of the late A. Read, and to dispose of the same, and also assigning the whole of the estate to them, but although dated 4th of May, it was admitted that it was not executed until after the 7th of May.

This was, however, not of much consequence, because Macaulay was called as a witness, and stated that Lockhart & Haldane were authorized before the Monday to make the sale. He also stated, that Lockhart telegraphed him of the sale to Pannell on Monday, that he did not dissent from it, and afterwards approved of it.

The defendant went to Ingersoll on the morning of Tuesday, the 7th, in company with a person named Watson, who was sent up by the plaintiffs to assist the defendant

in packing the goods, and also to take possession of other articles the property of the plaintiffs, which were not included in the sale to defendant. They arrived about noon the same day, and were occupied during the afternoon in checking and packing the goods, and while so engaged the store and a great portion of its contents were destroyed by an accidental fire.

There was a great deal of contradictory evidence given as to the bargain between the parties, on the question whether the goods were to be checked over by the defendant before they were to become his, or whether the defendant bought them as they appeared in the stock book.

The learned Chief Justice, with the assent of the counsel for both parties, submitted the following questions to the jury :

1. Was it part of the bargain, that the goods should be checked by the plaintiffs to the defendant.

2. And if so, on that checking being made was the defendant to be at liberty to reject the whole stock, or only to correct the amount to be paid, if any discrepancies arose on such checking.

3. Did the defendant accept the goods checked as goods delivered to him.

The jury answered the first question in the negative, and stated they thought it was useless to find on the other two questions, as they had found against the defendant on the first.

Upon this finding the learned Chief Justice directed a verdict for the plaintiffs, for \$4913.34, interest to be abated.

In Michaelmas Term *M. C. Cameron*, Q. C., obtained a rule calling upon the plaintiffs to shew cause why the verdict should not be set aside, and a new trial had between the parties, as being contrary to law and evidence, and for misdirection of the learned Judge, and for excessive damages; which said misdirection was, in telling the jury that the plaintiffs were the same as Alexander Macaulay, and in not telling the jury that at the time of the contract between the plaintiffs and defendant, the property in the

goods was not in the plaintiffs, and so could not have passed to the defendant, and the property not having passed, and the goods being destroyed without delivery to the defendant, he was not liable for the price; that the title to the goods was in John Young Read or Alexander Macaulay; and the whole claim not being due when the action was brought, the plaintiffs were not entitled to recover the full amount of the claim; and the form of the declaration did not entitle the plaintiffs to recover at all, as the action should have been for the non-delivery of the notes, and the other counts were not sustained by the evidence.

To this rule *Harrison*, Q. C., and *Lash*, shewed cause. The difficulty in this case has arisen from the destruction of the goods by fire before the notes for the balance of the purchase money were given. The defendant contends that the property had not passed to him, for that at the time of the alleged sale the goods were not the plaintiffs', and therefore they had no power to sell. Three points have been raised; 1. Had the plaintiffs any right to sell. 2. If they had, was there a sale sufficient to vest the property in the defendant—and 3. Is the declaration properly framed. Now as to the plaintiffs' right to sell, the evidence clearly shows that the defendant got possession of the goods from them, and acknowledged their title, and the jury having found that there was a sale and delivery to the defendant, he cannot now question the plaintiffs' title: *Walker v. Mellor*, 11 Q. B. 478; *Peers v. Carroll*, 19 U. C. R. 229. He cannot set up the right of Read, the administrator, or Macaulay, for they made and intend to make no claim: *Biddle v. Bond*, 6 B. & S. 225; *Barragan v. Sherwood*, 11 C. P. 119; *Brill v. The Grand Trunk R. W. Co.*, 20 C. P. 440; *Mason v. The Great Western Railway Company*, 31 U. C. R. 90; *Wilson v. Cameron*, 22 C. P. 198. But assuming that Macaulay and not the plaintiffs owned the goods, then the plaintiffs had the right as Macaulay's agents to sell, and therefore to sue defendant: *Fisher v. Marsh*, 6 B. & S. 411; *Chitty on Contracts*, 8th ed., 215, and both Read and Macaulay by their subsequent

ratification made the sale valid. Assuming the plaintiffs' right to sell, there was clearly a sale so as to satisfy the Statute of Frauds, for we have both a part payment, and the delivery on the 7th to the defendant: *Blackburn* on Sales, 128; *Benjamin* on Sales, 250; *Rohde v. Thwaites*, 6 B. & C. 388.

The jury have found that it was a simple sale of ascertained goods—namely, a certain stock, at a fixed price, without conditions—and the verdict is not against the evidence. A contract for the sale of a stock means the *whole stock*, as cargo means the *whole cargo*: *Covas v. Bingham*, 2 E. & B. 836. Even if checking the stock were to be part of the bargain, the defendant's own evidence shews that this was only to affect the price, and not the sale: *Martineau v. Kitching*, L. R. 7 Q. B. 436. See also *McBride v. Silverthorne*, 11 U. C. R. 545; and *Turley v. Bates*, 10 L. T. N. S. 35, which distinguishes *Simmons v. Swift*, 5 B. & C. 857; *Hanson v. Meyer*, 6 East. 614; and cases of a similar class. It is now clearly settled that the question whether the property passes or not, is governed by the intention of the parties; and it has been held that such intention may be presumed from payment: *Clarke v. Spence*, 4 A. & E. 448; *Wood v. Bell*, 5 E. & B. 772 & 792; *Young v. Matthews*, L. R. 2 C. P. 127; *Langton v. Waring*, 18 C. B. N. S. 315; *Bank of Upper Canada v. Killaly*, 21 U. C. R. 16. Here we have the payment of \$2,782; and it has been held that non-payment is evidence that the property should not pass: *Mason v. Great Western Railway Company*, 31 U. C. R. 90; *Robertson v. Strickland*, 28 U. C. R. 221. The intention being that the property should pass, it will pass notwithstanding something is to be done to the subject matter of sale: *Bank of Montreal v. McWhirter*, 17 C. P. 511; *Gilmour v. Supple*, 32 L. T. 1. As to the measure of damages, in an action for not delivering notes, the plaintiff is entitled to a verdict for the amount of the notes: *Hutchinson v. Reid*, 3 Camp. 329; *Hanna v. Mills*, 21 Wendell 90; *Mayne* on Damages, 2nd ed., 116. Defendant having rescinded the contract, the

plaintiffs have the right to rescind also, and to sue on the common counts: Notes to *Cutter v. Powell*, 2 Sm. L. C. 17; and cases there cited. The form of the declaration is clearly sufficient, and is taken from B. & L. Prec., 3rd ed., 238.

M. C. Cameron, Q. C., and *Read*, Q. C., contra. The case turns upon what were the rights of the parties on the 6th of May, the day the transaction took place. The plaintiffs could not then transfer to the defendant either title to or possession of the goods in question, for they had neither, but they belonged to J. Y. Read or to Macaulay. As to the alleged ratification by them, the authority given by J. Y. Read to take possession of the stock, was only on Macaulay's behalf; and the power of attorney executed by Macaulay, empowering the plaintiffs to take possession of the stock and dispose of it, although dated on the 4th of May, was not executed until after the 7th, the day the fire took place; and being after the property had ceased to exist, it could not relate back to the sale originally made by the plaintiffs, and so vest the property. The defendant is not estopped from denying the plaintiffs' title, for possession never was given to the defendant, but to one Watson, who went up with him, the defendant, to have possession on its being ascertained, by the checking what the amount of the goods was. But admitting the plaintiffs' right to sell, the fact that the notes to be given for the balance of the purchase money were not given at the time of the sale, and were not to be given until the goods should be checked, is a very strong circumstance to shew the intention of the parties that the property should not pass: *Young v. Matthews*, L. R. 2 C. P. 127: *Robertson v. Strickland*, 28 U. C. R. 221. The whole question is admitted to be one of intention; but it is laid down that no sale is complete, so as to vest in the vendee an immediate right of property, while anything remains to be done between the buyer and seller in relation to the goods: *Crawford v. Smith*, 7 Dana, 59-61; *Story on Sales*, 4th ed., pages 308, 317, secs. 296, 297. [HAGARTY, C.J.—The late cases have enlarged the

rule as to the property passing : see *Martineau v. Kitching*, L. R. 7 Q. B. 436]. The cases show that the property will pass unless there be a contrary intention, and there was such an intention here. As to the form of the declaration, it is not drawn so as to cover the subsequent notes, but only the first one, and it should have been for the non-delivery of the notes.

GALT, J.—There are three questions to be considered in this case ; First, was there a sale between the parties sufficient, if the plaintiffs possessed the property, to transfer the same to the defendant ; Second, Had the plaintiffs the right to sell the goods ; and Third, Is the action properly framed.

As regards the first. The evidence as to what took place on the bargain between the plaintiffs and the defendant, as to whether there was an agreement that the stock should be checked over before the defendant was to accept it, was expressly left to the jury, and they found that there was no such stipulation. We see no reason for questioning the correctness of that finding.

We have then a bargain for a specified quantity of goods, and payment of a large portion of the purchase money, and also the fact that the defendant proceeded to take possession of them with the consent of the plaintiffs, and was actually engaged in packing them up at the time of the fire with a view to their removal, when the accident happened. Under these circumstances we are of opinion that the property in the goods passed to the defendant, so far as the plaintiffs had the power to transfer it, and the goods were therefore at his risk : see *Young v. Matthews* (L. R. 2 C. P. 127).

The second question was the one on which the greatest stress was laid on the argument before us, the learned counsel for the defendant insisting that the plaintiffs had no property in the goods, and that they belonged either to the administrator, or to Macaulay.

The evidence shewed that on the 27th April, at a meeting

of the creditors of the late A. Read, at which the administrator was present, an agreement was signed by the plaintiffs, agreeing to the purchase of Read's estate on behalf of Macaulay on certain terms. This was not signed by the administrator, but was sanctioned by a number of the creditors; and the administrator swears that he considered this as a sale to the plaintiffs.

On the 6th of May the agreement between the plaintiffs and the defendant took place, and *after* the agreement was made, the plaintiffs applied to the administrator for an order on the person who held the key of the store in which the goods then were. This order was given, and also an authority to them to sell the goods on behalf of Macaulay. The order for the key was handed to a person of the name of Watson, who accompanied the defendant on the following morning to Ingersoll, when the defendant took possession of the goods. Macaulay, who resides in Ingersoll, was well aware of the object with which the defendant came to Ingersoll, and swears that the plaintiffs were authorized to make the sale before the Monday on which they had done so, and that he had been informed by telegraph of the sale, and that he did not dissent from it. All these transactions took place before the fire.

The cases of *Soames v. Spencer* (1 D. & R. 32), and *Maclean v. Dunn* (4 Bing. 722), are expressly in point to shew that a subsequent recognition, even by parol, of an agreement previously entered into by a person entitled to goods, is quite sufficient to constitute a binding agreement.

In the former case Holroyd, J., says, page 34, "In this case, according to the evidence, there was a subsequent ratification by *Tennant*," (a person who was interested in the property sold, and who was not a party to the original bargain,) "of the original contract and, I think, that is sufficient to give it validity though originally made without his authority. His subsequent ratification amounts to an original authority." In the latter case the former is mentioned and approved, and Best, C. J., in referring to it says, page 727: "In *Soames v. Spencer*, where A. and B.,

being jointly interested in a quantity of oil, A. entered into a contract for the sale of it, without the authority or knowledge of B., who, upon receiving information of the circumstance, refused to be bound, but afterwards assented by parol, and samples were delivered to the vendees; it was held, in an action against the vendees, that B.'s subsequent ratification of the contract rendered it binding, and that it was to be considered as a contract in writing within the Statute of Frauds. This is an express decision on the point, that under the Statute of Frauds the ratification of the principal relates back to the time when the agent made the contract."

HAGARTY, C. J.—I think the evidence fully warranted the finding for the plaintiffs. I cannot see any difficulty arising from the pleadings. The first count substantially shews the whole complaint and claim for damages. The breach is, that defendant has not paid by his promissory notes, or otherwise.

If it were necessary to have a count specially framed for not giving the notes as agreed, the Court at the trial was ready, as it appears, to allow such a count to be added.

But when, as here, the contract is set out and the terms of payment, part cash and part notes at stated dates, and an averment that defendant refused to pay the agreed-on price by notes or otherwise, it is not easy to see why such a form of allegation should not suffice.

The measure of damages would be the same on this count, and on such a count as the defendant objected should have been on the record, and the defendant should get credit in discount for the time the notes had to run.

I think there was a complete contract proved, sufficient to satisfy the Statute of Frauds.

Even if, as defendant asserts, the goods were to be checked with the stock book as a necessary preliminary to ascertaining the amount for which the notes were to be given, and that he declined to be bound by the quantities in the stock book, I still see no reason why the property

should not have passed, if it were the intention of the parties that it should pass.

The plaintiff swears that he so intended, and the conduct of the defendant leaves no doubt in my mind that he so intended also.

His payment of the cash agreed on; his preparation of the handbill as to the intended sale of the goods on his account in Hamilton at a day so near at hand; his sale of the hats, &c., all tend to shew his idea of the nature of the transaction.

The late case of *Martineau v. Kitching* (L. R. 7 Q., B. 436) is important. Cockburn, C. J., says, page 450, "I agree to sell a man a specific thing—say a stack of hay, or a stack of corn. I agree to sell him that specific thing, and he agrees to buy it: the price undoubtedly remains an element of the contract, but we agree, instead of fixing upon a precise sum, that the sum shall be ascertained by a subsequent measurement. What is there to prevent the parties from agreeing that the property should pass from one to the other, although the price is afterwards to be ascertained by admeasurement? I take it that is the broad substantial distinction. If, with a view to the appropriation of the thing, the measurement is to be made as well as the price ascertained, the passing of the property being a question of intention between the parties, it did not pass because the parties did not intend it to pass."

In the case before us there was a sale of a specific stock of goods supposed to be all set forth in the stock book. The purchaser pays a considerable portion of the price in cash, and (assuming his version to be correct) the giving of the notes is deferred till the quantity is precisely ascertained by checking; not with a view of ascertaining what is sold or what is not sold, but to ascertain how much there may be, to settle the price at the contract rate of seventy-two cents in the dollar.

It seems just like the case suggested of the sale of a stack of hay at an agreed price per hundred weight, to be ascertained by admeasurement.

I think the finding of the jury on the case submitted to them, settles the matter in favour of the plaintiffs, although I am not satisfied that a different finding as to the checking would have destroyed the plaintiffs' right to recover.

As my brother Galt has explained the evidence, I see no difficulty as to the plaintiffs' right to sue.

As far as Read's, the administrator's, title was concerned, he certainly placed the plaintiffs in a position, either on their own behalf or on that of Macaulay, to make a good transfer of the goods. They could, I think, have sold either in Macaulay's name or their own; and Macaulay, before the fire, was notified of the sale to Pannell, did not then dissent, and afterwards fully ratified it.

As to suing before the time for performance on a direct repudiation of the contract by defendant, I refer to *Frost v. Knight*, L. R. 5 Ex. 322, and its full commentary, at page 327, on the oft-cited case of *Hochster v. De la Tour*, 2 E. & B. 678.

GWYNNE, J., concurred.

Rule discharged.

MEMORANDA.

In Easter Term, 1872, CHRISTOPHER ROBINSON, Q.C., was appointed Editor-in-Chief of Law Reports; and in Michaelmas Term following GEORGE FREDERICK HARMAN was appointed Reporter to the Court in the place of SALTER J. VANKOUGHNET, who resigned.

A DIGEST

OF

ALL THE REPORTED CASES

DECIDED IN

THE COURT OF COMMON PLEAS,

FROM MICHAELMAS TERM, 35 VICTORIA, TO HILARY TERM, 36 VICTORIA.

ACCOMMODATION ENDORSERS.

Right of contribution between.]—
See BILLS OF EXCHANGE AND PROMISSORY NOTES, 6.

ACCORD & SATISFACTION.

1. To an action for breach of contract, the 7th plea stated that after testator's contract and promise it was agreed between him and plaintiff in his lifetime that he should not perform them, but instead testator should deliver to plaintiff, who was to accept, a different boiler and engine larger and more valuable, requiring a longer time for construction, and afterwards before action, testator in his lifetime and defendants as executors, did make and deliver to plaintiff, who accepted same upon such terms, and paid the price thereof:

Held, bad.—*Leonard v. Northey et al.*, 11.

2. *Satisfaction and discharge—Evidence.*]—A note payable by defendant to plaintiff, was sent to him on application for pay-

ment of an account, and after acknowledgment of its receipt, stated to have been "placed to your credit: the endorsers are not known to us, but on your stating that each one is good for the amount we accept the note in settlement of your account to date." At the maturity of the note defendant wrote expressing regret at his inability to meet it and requesting him to draw upon him, and that he could hold the note until payment of the draft: he subsequently telegraphed him that he would remit in a few days.

Held, a question, on the evidence for a Judge or jury, whether plaintiff had accepted the note in satisfaction or discharge, or not, and it having been found that he had not, the Court refused to interfere.—*Greenwood v. Foley*, 352.

ACCOUNT STATED.

Evidence of—Promissory note—Stamps.]—*Held*, that an instrument in the form "Good to Mr. Palmer

for \$850 on demand," was not a promissory note, and so requiring a stamp, but (GWYNNE, J., dissenting), that in the absence of any explanation of the circumstances under which it was given it was *prima facie* evidence to go to a jury of an account stated, *Palmer v. McLennan*, 258.

The above judgment was affirmed on appeal, WILSON, J., dissenting on the ground that it was a promissory note, and so requiring a stamp, and GWYNNE, J., adhering to his judgment in the Court below.—*Palmer v. McLennan*, (*In appeal*), 565.

ACQUIESCENCE.

See ESTOPPEL, 1.

ACTION.

By Husband and Wife.—See DEFAMATION.

For tolls, in whose name.—See CORPORATIONS, 2.

For injury to person by negligence—when it survives against defendant's executors—See EXECUTORS AND ADMINISTRATORS.

For calls.—See CORPORATIONS, 1.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

ADMISSIONS.

Admission of title.—*Held*, in ejectment, that it was no admission of the title of the party through whom defendant claimed, that the party through whom plaintiff derived title had, long after his title by possession had matured, filed a bill in Chancery, against the former, for specific performance of an agreement for sale of the land in

question to him; first, because the statements contained in such a bill were not under *Boileau v. Rutlin*, 2 Ex. 665, evidence; and secondly, because the title was absolute at the time the bill was filed, and could not be set aside by admissions that at some former period the land had belonged to another than the one claiming by possession.—*Mulholland v. Conklin*, 372.

ADDRESS OF COUNSEL.

See COUNSEL.

ADVANCES ON GOODS CON-SIGNED FOR SALE.

Right to recover before sale of goods.—See COMMISSION MERCHANTS.

AFFIDAVIT OF DEBT.

See ARREST—AWARD.

AGREEMENT.

Parol evidence of surrounding circumstances when admissible to explain.—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 4.

ALIENS.

Alienage—12 Vic. ch. 197, sec. 12.]—In ejectment it appeared that plaintiffs' ancestors were aliens; but *Held*, no bar to their recovery, the 12 Vic., ch. 197, sec. 12, having been passed before ancestors' death.—*Rumrell et al. v. Henderson et al.* 180.

ALLOTMENT OF STOCK,

When unnecessary.—See CORPORATIONS, 1.

AMENDMENT.

In this case where plaintiff brought an action on the common counts the Court refused to allow him to amend, by adding a count as assignee of the covenant to pay the mortgage contained in the deed from P. to defendant.—*Snyder v. Snyder*, 361.

APPEAL.

Appeal struck out as set down too late—Costs.]—Where the Court of Error and Appeal refused to hear an appeal, and ordered it to be struck out, because it had not been set down for argument within the time allowed by 34 Vic. ch. 11, sec. 4, O.; *Held*, that the respondent, who had appeared to answer the appeal, was entitled to his costs, for the appellant should have applied earlier for an extension of the time; and that the Court had jurisdiction to grant costs, though the appeal had not been heard.

Semble, that the respondent should have stated the lapse of time as one of his reasons against the appeal.—*The Royal Canadian Bank v. Stevenson*, (*In appeal*), 562.

See *INSOLVENCY*, 3.

ARREST.

Practice—Affidavit of debt.]—An affidavit of debt whereon a Judge's order holding a defendant to bail was founded, stated simply "that the defendant is justly and truly indebted to me (the plaintiff) in the sum of \$259.90, for medicine, medical attendance, and services, and money lent, a detailed account of which I have some months ago delivered or caused to be delivered to him;" without averring either

that the medicine was delivered, the medical attendance and services performed, or the money lent by the plaintiff to the defendant, or at his request.

Held, following *Handley v. Franchi*, L. R. 2 Ex. 34, affidavit insufficient.

Semble, that the affidavit would be sufficient, without the words at his request.

Quære, whether, on an application to set aside the arrest, affidavits can be received in shewing cause to support the original affidavit as to the cause of action.—*Diamond v. Cartwright*, 494.

ARREST OF JUDGMENT.

See *CRIMINAL LAW*, 2—*VENUE*.

ARSON.

Attempt at]—See *CRIMINAL LAW*, 3.

ASSAULT.

Action for—Provocation by libel.]—*Held*, in an action for assault, that libellous and abusive articles reflecting on the defendants, published on the day of, and preceding, the assault, in a newspaper of which the plaintiff was the proprietor, were admissible in evidence in mitigation of damages.

But where the verdict was for \$50 only, and, though such evidence was rejected, the jury were fully informed by defendants' counsel that the assault was committed in consequence of these articles, and the Court saw no reason to believe that defendants had been prejudiced by the ruling, a new trial was refused, but, under the circumstances without costs in term to either party.—*Percy v. Glasco et al.*, 521.

ASSAULT.

Conviction for, on indictment for murder, same quashed.]—See CRIMINAL LAW, 1.

ASSESSMENT

Assessment for street watering—By-law necessary.]—See MUNICIPAL CORPORATIONS, 1.

ASSETS.

Concealment of.]—See INSOLVENCY, 5.

ASSIGNEE, (IN INSOLVENCY.)

Jurisdiction of Judge over removed.]—See INSOLVENCY, 3.

Liability on premium note.]—See INSURANCE, 1.

ASSIGNMENT.

Choses in action—Distinct claims—35 Vic. ch. 12 O—Construction of.]—Plaintiff sued on an arbitration bond, alleging an award that defendant should pay the plaintiff a sum of money and convey to him certain lands, and assigning as breaches non-payment and neglect to convey. Defendant pleaded as to the first breach, that since the 35 Vic. ch. 12, O., the plaintiff had assigned to one B. the money awarded, of which defendant had notice. *Held*, a good plea; for that such assignment of the money alone, without the bond, was valid under the Act. — *Wellington v. Chard*, 518.

See INSURANCE, 1.—MONEY PAID, 1.

ATTORNEY GENERAL.

Appointment of.—560.

AUCTION.

Sale of goods—Catalogues distributed before sale—Terms announced at sale—No warranty.]—In a printed catalogue of articles for sale, a bull was stated to be “a sure stock-getter,” but at the commencement of the sale the auctioneer publicly announced that the seller (defendant) warranted nothing:

Held, that plaintiff (the purchaser) in an action as for a breach of warranty, was obliged to shew that a warranty, if any, contained in the catalogue, was imported into the sale at auction at which he bought. — *Craig v. Miller*, 348.

BARRISTERS CALLED.

114, 278, 410, 560.

BILL IN EQUITY.

To restrain similar action.]—See FORMER RECOVERY, 2.

Statements in—How far evidence.]—See ADMISSIONS.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Account stated—Evidence of—Promissory note—Stamps.*]—*Held*, that an instrument in this form, “Good to Mr. Palmer for \$850 on demand.” was not a promissory note, and so requiring a stamp, but (GWYNNE, J., dissenting), that in the absence of any explanation of the circumstances under which it was given, it was *prima facie* evidence to go to a jury of an account stated. — *Palmer v. McLennan*, 258.

The judgment in this case was affirmed on appeal, WILSON, J., dissenting on the ground that it was a promissory note and so requiring

a stamp, and GWYNNE, J., adhering to his judgment in the Court below.—*Palmer v. McLennan, (In appeal),* 565.

2. *Promissory note payable in foreign country and currency—Action in this Province.*—A note payable in the United States, in American currency, and all the parties to which reside in this country, may be sued upon here.—*Greenwood v. Foley*, 352.

3. *Promissory note—Notice of dishonour—Evidence.*—In an action against the executors of a deceased indorser of a note, it appeared that some of the notices of dishonour were addressed, "Administrators of William Stinson's estate, Belleville, Ont.," while others were similarly addressed "Canifton," the latter having been testator's place of residence. It was proved that the notices were posted in due time, and as to the receipt of them one of the executors stated that he had received two, one several weeks after the maturity of the note, from testator's widow, who got it at Canifton, the other from his executor; but whether a day or a fortnight after protest he could not say; while his co-executor stated that he had never received any notice at all, but was shewn one by the other as having been received by him.

Held, that the reasonable inference to be drawn from this evidence was that the notice had been received in due course.—*McKenzie v. Northrop et al.*, 383.

4. *Agreement — Parol evidence—Payable to my order—Meaning of.*—In an action on an agreement, by which—in consideration of the plaintiff giving defendant his promissory note for \$438, payable four

months after date, as the purchase money for a note for \$730 made by T. & Son, having then ten months to run, payable to defendant's order—defendant agreed to keep the plaintiff's note renewed until the maturing of T. & Son's note; and at the maturity of T. & Son's note, "to procure the said T. & Son to renew their said \$730 note, by giving their seven promissory notes for equal amounts payable to my order and payable in one, two, and three months," &c.;

Held, that the words "payable to my order" did not necessarily import an unconditional endorsement by defendant of the seven notes, but might mean only such an endorsement as would pass the property in them to the plaintiff: that evidence of conversations between the parties before making the agreement, and of the surrounding circumstances, was therefore admissible to shew its true meaning; and it appearing that the note for \$730, also payable to defendant's order, was endorsed by defendant "without recourse," and that the plaintiff designedly left the agreement doubtful, so as to insist upon an unconditional endorsement as to the others: *Held*, that he could claim only that these notes should be endorsed as the first one was.—*McCarthy v. Vine*, 458.

5. *Promissory note—Transfer by holder after maturity—Equities attaching.*—The plaintiff sued as bearer of a promissory note made by defendant payable to one McL., or bearer. Defendant pleaded, on equitable grounds, that McL., being the holder of said note, deposited it with one McD. as collateral security for the payment by said McL. of a certain note of the said McL.

then held by said McD., which said note McD. transferred and delivered to the plaintiffs, and deposited the note in the declaration mentioned with the plaintiffs after it became due as collateral security; and that the said McL. did, before the commencement of this suit, retire, pay, and satisfy his said note, and was and is entitled to a return of the note now sued on, so held by the plaintiffs as collateral security, and is the lawful holder of the said note.

Held, on demurrer, plea bad for 1. The terms upon which the note was transferred to McD., which formed no part of the original consideration for which it was given, and to which the defendant was no party, did not constitute an equity attaching to the note in the plaintiffs' hands of which defendant could take advantage; and 2. That even if it were assumed that the plaintiffs had no better title than McD., still McD., being the holder at maturity, had a vested right of action against the defendant.—*The Canadian Bank of Commerce v. Ross*, 497.

6. *Accommodation Endorsers—Right of contribution.*—Where first and second indorsers on a note have, in fact, endorsed as mere sureties for the maker, the second not expressly stipulating for any right of recourse against the first, the first indorser, having paid the note, is entitled to contribution against the second; and it is immaterial that the first endorser did not endorse on the faith that there was to be another endorser, or that the second endorser believed that the first would be liable to him, and believed also that he, (the first endorser), was a partner with the maker.

Where one I. at the request of the plaintiff (the first endorser) took up the note, and the plaintiff afterwards repaid him. *Held*, that this was a payment by the plaintiff in discharge of the liability which he and defendant (the second endorser) had undertaken; and was sufficient to entitle him to recover.

Held, also, that the evidence, set out in this case, warranted the finding that the plaintiff did endorse merely as surety for the maker, and that I. paid the money for the plaintiff, intending to look to him for repayment.—*Ianson v. Paxton*, 505.

See ACCORD AND SATISFACTION, 2
— FRAUD — MISREPRESENTATION —
STAMPS.

BILL OF SALE OF VESSEL.

Unregistered—Right of registered owner to sue for injury.—See SHIPPING.

BOUNDARY.

Of road allowance.—See MUNICIPAL CORPORATIONS, 2.

BRIDGE.

Liability to repair.—See HIGHWAYS, 3.

BY-LAW.

Quashing by-law under which license issued does not nullify license.—See LICENSE TO SELL LIQUORS.

Necessary for Street Watering.—See MUNICIPAL CORPORATIONS, 1.

In aid of railway—Ratepayers' assent not obtained.—See RAILWAYS, 2.

CALLS.

Action for.—See CORPORATIONS, 1.

CATALOGUES.

Warranty in, when imported in sale.—See AUCTION.

CHATTEL MORTGAGE.

Refiling.—See FIXTURES.

CHOSSES IN ACTION.

See ASSIGNMENT.

COMMISSION MERCHANTS.

Advances on goods consigned for sale—Right to recover.—The defendant, at Brantford, consigned for sale to the plaintiff, a commission merchant, at Montreal, a lot of butter for sale, and drew upon him at five days for \$2000, which the plaintiff accepted, and paid at maturity. At that time his instructions were, not to sell for less than 18½c. per lb., which he could not get. The market continued to fall, and after a lengthy correspondence the butter was sent to plaintiff's agents at Halifax, who wrote that no sale could be effected there, and advising Jamaica. Plaintiff then sued the defendant upon the common counts for the money paid by him.

Held, that he was entitled to recover, and that there was nothing in the facts, more fully set out in the case, to vary the common law obligation to refund the advance on request, or to compel the plaintiff to wait until a sale should be effected.

At the trial, defendant tendered evidence to shew the meaning of cash advances made by commission merchants on account of goods consigned to them for sale, and the usual practice as to commission merchants reimbursing themselves for such advances.

Held, that such evidence was properly rejected.—*Cowie v. Apps*, 589.

COMMON COUNTS.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1—ESTOPPEL, 1.

COMPARISON OF HAND-WRITING.

See EVIDENCE.

COMPOSITION AND DISCHARGE (DEED OF.)

See INSOLVENCY, 7.

COMPROMISE.

See MISREPRESENTATION.

CONCEALMENT OF ASSETS.

See INSOLVENCY, 5.

CONSTRUCTION.

Of covenant for quiet enjoyment, whether restricted or general.—See COVENANTS FOR TITLE.

CONTRACT.

Substitution of contract—Reservation of rights against covenantor—Pleading.—To an action for breach of contract between plaintiff and defendant, that defendant would build plaintiffs' railway, to be completed by a day named, defendant pleaded *equitable plea*, that plaintiffs with consent of defendant agreed with E. to finish said railway, and defendant, before breach, abandoned said contract, and E. entered upon and took possession of the works on said railway, and continued the same with plaintiffs' consent:

Replication, that by the agreement in the last plea mentioned, plaintiffs' rights against defendant were expressly reserved:

Held, on demurrer, replication good, but plea bad, as not shewing that the alleged substituted contract contained all the essentials requisite to make it a complete discharge and release of the original one.—*Port Whitby and Port Perry R. W. Co. v. Dumble*, 39.

Avoidance by fraud.—See FRAUD.

See ACCORD AND SATISFACTION—COVENANTS—LEAVE AND LICENSE.

CONTRIBUTION.

Right of between accommodation endorsers—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 6.

CONTRIBUTORY NEGLIGENCE.

See LANDLORD AND TENANT, 2.

CONVICTION.

For assault cannot be on indictment for murder.—See CRIMINAL LAW, 1.

See LICENSE TO SELL LIQUORS.

CORPORATIONS.

1. *Action for calls—Subscription for stock—Allotment unnecessary.*]

Defendant subscribed for certain shares of plaintiffs' stock, an incorporated Company under 27 & 28 Vic. ch. 23, and bound himself to pay as required by the Board of Directors. Somewhat over half the capital stock was subscribed for in this way:

Held, no answer to plaintiffs' call on defendant for the amount of his stock, that there had been no *allotment* of shares and defendant was not therefore a shareholder. *Held*, also, that plaintiffs were entitled to call in all the unpaid stock at one time, as the Act did not prevent their so doing.

The statute provided for the issue of Letters Patent on half the capital being subscribed, though no express provision was made as to when the Company should commence business; but the plaintiffs had commenced business with defendant's full knowledge, and he was, in fact, elected and acted as a director and never resigned his position as such:

Held, that he could not deny his liability to pay his stock on the ground that *all* the stock must be subscribed before calls could be made; that the directors were warranted, on a proper construction of the Act, in commencing business, one-half the stock being subscribed, and in making the necessary calls therefor.—*Lake Superior Navigation Co. v. Morrison*, 217.

2. *Joint Stock Company—Mortgage of Tolls, &c.—Foreclosure—Action for Tolls, in whose name.*—A Harbour and Road Joint Stock Company, by its Charter (16 Vic., ch. 141), had power to levy Tolls on goods landed or shipped within certain prescribed limits; and the harbour, roads, wharves, and all the real estate, were to be vested in the Company and their successors for ever. The Company, finding it necessary to mortgage the harbour, tolls, &c., did so under authority of their Charter, and the Mortgagee foreclosed the security, entered into possession, and leased to plaintiff, who sued defendant, owner of a wharf within the statutable limits of the harbour, for tolls on goods shipped or landed on defendant's wharf:

Held, That the plaintiff could sue only in the corporate name, and a nonsuit was therefore directed.—*Whiteside v. Bellchamber*, 241.

See MUNICIPAL CORPORATIONS.

COSTS.

Of appeal when struck out as set down too late.]—See APPEAL.

See TARIFF OF FEES.

COUNSEL.

Action by and against husband and wife—Evidence merely conjectural—Right to address jury.]—In an action by husband and wife for negligence of defendants, surgeons, in treatment of wife, the evidence was of a very weak and unsatisfactory character, amounting in fact to pure conjecture whether there had been any negligence or not; while the evidence offered on behalf of defendants was of the most favourable character to them:

Held, that, on plaintiff's counsel declining to take a nonsuit, the Judge was right in directing the jury to find for defendants, as also in refusing him the right to address the jury on the whole case. Storey et al. v. Veach et al. 164.

COURT HOUSE.

Use of, liability for.]—See MUNICIPAL CORPORATIONS, 5.

COURTS.

See CRIMINAL LAW, 1.

COVENANTS.

Independent.]—To an action for breach of contract between plaintiffs and defendant, that defendant would build plaintiffs' railway, to be completed by a day named, defendant pleaded that plaintiffs covenanted and agreed to pay defendant a certain sum of money (in manner specified), and that, although they paid portion of the same, they made default as to the residue,

which was due long before action, whereby defendant was prevented from completing the railway under his agreement:

Held, on demurrer, bad.—Port Whitby and Port Perry R. W. Co. v. Dumble; 39.

See CONTRACT.—PLEADING, 1.

COVENANTS FOR TITLE.

Deed of land—Covenant for quiet enjoyment—Construction—Whether restricted or general.]—Held, on demurrer to the declaration set out in this case; and following Austin v. Ferguson, 25 U.C.R. 270, that a full covenant for quiet enjoyment and freedom from incumbrances contained in a deed for the conveyance of land is not controlled by the restrictive words preceding the earlier covenants.—Wallbridge v. Everitt, 28.

CREDITOR.

Composition deed—Creditor not signing—Action by.]—See INSOLVENCY, 7.

CRIMINAL LAW.

1. *Indictment for Murder—Conviction of assault quashed.]—Held, following Regina v. Bird, 2 Den. C. C. 94, & Regina v. Phelps, 2 Moo. C. C. 240, that on an indictment for murder the prisoner cannot be convicted of an assault under 32 & 33 Vic. ch. 29, sec. 5.—Regina v. Ganes et al., 185.*

2. *Larceny of Police Court information—Maliciously destroying same—Patent defect in indictment—Arrest of judgment after verdict—Reversal in Error—Police Court a Court of Justice within 32 & 33 Vic., ch. 21, sec. 18—Reservation of this question*

at Nisi Prius—C. S. U. C., ch. 112, sec. 1—Count for felony with allegations of previous convictions for misdemeanour—Misjoinder of counts.

Held, that the Police Court of the city of Toronto is a Court of Justice within 32 & 33 Vic., ch. 21, sec. 18, and that the prisoner was properly convicted of stealing an information laid in that Court.

Held, also, that maliciously destroying an information or record of the said Court is felony within the same Act.

Held, also, that the Court will not arrest judgment after verdict, or reverse judgment in Error, for any defect patent on the face of the indictment, as by 32 & 33 Vic., ch. 29, sec. 32, objection to such defect must be taken by demurrer, or by motion to quash the indictment.

Whether the Police Court is a Court of Justice within 32 & 33 Vic., ch. 21, sec. 18, or not, is a question of law which may be reserved by the Judge at the trial, under Consol. Stat. U. C., ch. 112, sec. 1, and where it does not appear by the record in Error that the Judge refused to reserve such question it cannot be considered upon a writ of Error.

Where an indictment contains one count for larceny, and allegations in the nature of counts for previous convictions for misdemeanours, and the prisoner, being arraigned on the whole indictment, pleads "not guilty," and is tried at a subsequent assize, when the count for larceny only is read to the jury, *Held*, no error, as the prisoner was only given in charge on the larceny count.

It is not a misjoinder of counts

to add allegations of a previous conviction for misdemeanor, as counts, to a count for larceny, and the question, at all events, can only be raised by demurrer, on motion to quash the indictment under 32 & 33 Vic., ch. 29, sec. 32; and where there has been a demurrer to such allegations, as insufficient in law, and judgment in favour of the prisoner, but he is convicted on the felony count, the Court of Error will not reopen the matter on the suggestion that there is misjoinder of counts.

An indictment describing an offence within 32 & 33 Vic., ch. 21, sec. 18, as feloniously stealing an information taken in a Police Court, is sufficient after verdict.—*Regina v. Mason*, 246.

3. *Attempt at arson—Evidence.*—On an indictment for attempt to commit arson, the evidence showed that one W., under the direction of the prisoner, after so arranging a blanket, saturated with oil, that, if the flame were communicated to it, the building would have caught fire, lighted a match, held it till it was burning well, and then put it down to within an inch or two of the blanket, when the match went out, the flame not having touched the blanket :

Held, that the prisoner was properly convicted, under 32 & 33 Vic. ch. 22, sec. 12, of an attempt to commit arson.—*The Queen v. Goodman*, 338.

CROWN DEED.

Where married woman claims under, husband need not have entered to entitle him as tenant by the curtesy.]
—See TENANT BY THE CURTESY.

CUSTOM.

Evidence of, when admitted.]—See COMMISSION MERCHANTS.

CUSTODY OF ANCIENT DEEDS.

See EVIDENCE.

DAMAGES.

Trespas.]—Defendant, being guardian in insolvency to the estate of one W., seized goods in the plaintiff's possession exceeding \$800 in value, which the plaintiff claimed under a purchase from W. made about two months before W. absconded.

The circumstances attending the alleged purchase were very suspicious. The plaintiff had been working for W. as a labourer, having no capital, and he had given his notes for the purchase money, with an agreement to deposit all receipts from sales to the credit of such notes weekly, and that W. might retake the goods on default. It was sworn too, that when the seizure was made, he said they should at least allow him wages. The jury were told to find for defendant if they considered the transaction to be fraudulent, but they found for the plaintiff, giving only \$65: *Held*, that admitting defendant to be a mere wrong-doer, the jury, with a view to damages, might take into consideration the true nature of the plaintiff's interest, and a new trial was refused.—*Long v. Monck et al*, 387.

Joint and several claim for.]—See DEFAMATION.

DEATH.

Suggestion of, when right of action survives against defendants exe-

cutors.]—See EXECUTORS AND ADMINISTRATORS, 1.

DECLARATION.

Amendment of refused.]—See AMENDMENT.

DEDICATION.

See HIGHWAYS, 3.

DEED.

Proof of.]—See COVENANTS FOR TITLE.

See EVIDENCE, 1.

DEED OF COMPOSITION AND DISCHARGE.

See INSOLVENCY, 7.

DEFAMATION.

Action by husband and wife—Slander—Words not set out—Joint and several claim for damages—Pleading.] The first and second counts of a declaration, in an action by husband and wife, charged slander of wife, consisting of imputations of adultery and prostitution, without setting out the words:

Held, clearly bad.

The third count was for assaulting wife, whereby, &c.; and the fourth and fifth counts were, respectively, for assault of wife, *per quod consortium amisit*, and of husband himself. The plaintiffs claimed damages jointly under the first four counts, and the husband alone under the fifth count: *Seem*, that the claim for damages by both plaintiffs though bad as to the fourth count, was good as to the first three; but that both plaintiffs being expressed in the declaration to sue in respect of all the counts, though the husband alone, at the conclusion, claimed in respect of the fifth count,

the whole declaration was bad.—
Breen et ux. v. McDonald, 298.

DELAY.

See APPEAL.

DEMISE.

See MONEY PAID, 1.

DISCHARGE.

Plea of.]—See INSOLVENCY, 5.

DISTRESS.

For rent—Seizure of sheep—Liability of landlord—Trespass.]—It is illegal to distress sheep for rent when there are other goods upon the premises sufficient to satisfy the claim; and trespass was therefore held to lie against a landlord for the act of his bailiff in so distressing, it appearing that he had spoken of his making the sale, and had received the proceeds thereof, and no evidence being offered of his non-complicity therein.—*Hope v. White et al.* 5.

See INSOLVENCY, 4—REPLEVIN.

DRAINAGE.

See HIGHWAYS.

EDITOR-IN-CHIEF OF REPORTS.

Appointment of, 609.

EJECTMENT.

See EVIDENCE, 1—LIMITATIONS, STATUTE OF—POSSESSION.

ELECTIONS.

Postmasters.]—*Held*, that a postmaster of a city is not liable to a penalty for voting at an election for a member of the House of Commons of the Dominion of Canada.

But, *Semble*, per HAGARTY, C. J., he is not entitled to vote, and should he do so his vote might be struck off on a scrutiny.—*Savage v. Deacon*, 441.

ENCUMBRANCE.

See INSURANCE, 2.

ENROLMENT.

9 Geo. 2, ch. 36—*Enrolment in Chancery unnecessary—Construction.*]—*Held*, following the series of authorities from *Doe Anderson v. Todd*, 2 U. C. R. 82, down to *Davidson v. Boomer*, 15 Grant, 1, 218, that 9 Geo. 2, ch. 36, is in force in this Province, but that enrolment in Chancery is not necessary to validate a deed in other respects executed in compliance with that Act.—*Hambly v. Fuller*, 141.

EQUITABLE PLEADING.

See CONTRACT—FORMER RECOVERY—MISTAKE.

EQUITIES.

Attaching to overdue note.—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 5.

ERROR.

See CRIMINAL LAW, 2.

ESTOPPEL.

1. *Action for penning back water—Acquiescence.*]—Declaration (1st and 2nd counts), penning back water upon plaintiff's land.

Plea (6th), on equitable grounds, that when plaintiff's ancestor owned the land, S. owned adjoining land, on which, being desirous of building a mill, to be driven by water of stream in question, it was necessary for such purpose, by means of a dam

built upon S.'s land, to pen back stream, and a little to overflow ancestor's land: that ancestor had full knowledge of premises, and consented and agreed with S. that S. should build dam to height specified and agreed between them, and should so raise, pen back, and obstruct stream: that S., relying on such consent and agreement, and upon acquiescence of ancestor, built mill and raised dam to agreed height, and no higher, and in so doing expended large sums of money, ancestor knowing, acquiescing, and consenting to his so doing: that S. worked mill by water raised and penned back by dam, and S. and those claiming under him, always worked mill and maintained dam with consent and acquiescence of ancestor and of plaintiff, and all others claiming under ancestor: that S. devised in fee "mill and dam and lands on which they were built" to his son, who "granted same" to defendant who worked mill and maintained dam at height no greater than height agreed between ancestor and S.:

Held, on demurrer, plea good.—*Dean v. Gray*, 202.

2. *Held*, in ejectment, that where the entry of one J. W., under whom J. C. W. his son and the defendants claimed, was under C., the plaintiff's deviser, defendants could not object to C.'s title at the time of J. W.'s entry.—*Cahuac v. Scott*, 551.

3. *Sale of land—Action for purchase money—Receipt under seal.*—Plaintiff in August, 1867, conveyed to defendant certain land, by deed containing a receipt for the purchase money. It appeared, however that when this conveyance was made, some question being raised as to plaintiff's title, the defendant re-

tained \$100 of the purchase money and in October following gave the plaintiff the following agreement: "Harriston, Oct. 1st, 1867. Fifteen months after date, I promise to pay to the order of William Harrison, or bearer, the sum of \$100, providing that the title is good, on lots known as Town Hall, Court House, and Fair Ground, situated on north side of Elora street, for value received,"—these being the lots conveyed. Plaintiff sued defendant on this agreement, and on the common counts, to which defendant pleaded payment.

Held, that the plaintiff was estopped by the receipt in the deed, which included this \$100, and that he could not recover.—*Harrison v. Preston*, 576.

See FORMER RECOVERY—LANDLORD AND TENANT, 1.

EVIDENCE.

1. *Proper custody of ancient deeds—Presumption of identity—Orders in Lunacy under Imperial Act—Proof of deeds—Notice under sec. 17 of Ejectment Act—Prior possession as title in ejectment—Comparison of handwriting.*—Deeds purporting to be upwards of 30 years old were produced from the custody of the solicitors of plaintiffs, who claimed as trustees, and one of which solicitors was a plaintiff in the action. The plaintiffs claimed under these deeds through several mesne conveyances. The solicitor-plaintiff had once recovered judgment in ejectment for the land in question, as one of the three trustees. *Held*, that the deeds were produced from the proper custody to entitle them to be received in evidence as ancient documents.

2. Lands were conveyed, in 1804, by deed to W. R. By a deed poll,

endorsed upon the deed of 1804, and dated in 1823, W.R., described as "the within named W.R." granted the same lands to trustees of a marriage settlement executed in 1820, under which plaintiffs claimed. *Held*, that the W.R. who executed the deed poll would be presumed to have been the grantee of the deed of 1804, notwithstanding recitals in other deeds, produced by the plaintiffs as part of their chain of title, tending to shew that the grantee of the deed of 1804, was dead before 1820. 3. The Court is bound to take notice that the Imperial Act, 11 Geo. IV. and 1 Wm. IV. ch. 60, enables lands in this Province, held in trust by a person of unsound mind, to be conveyed by a committee appointed by the High Court of Chancery in England. 4. For the purpose of proving the execution of deeds, a witness, who was not the witness to the deeds, went to the persons by whom the deeds purported to have been executed, who admitted to him that the signatures were theirs, and who wrote their names in the presence of the witness, who had no previous acquaintance with them or with their handwriting: *Held*, that evidence of these admissions and of the belief of the witness, from the knowledge of the handwriting thus acquired, that the signatures to the deeds were genuine, was good evidence to go to a jury and, in the absence of any contradictory evidence, sufficient to warrant a finding, that the deeds had been duly executed upon the respective days upon which they purported to have been executed. 5. *Seemle*, that an objection to the absence of proof of an order in Chancery, recited in a deed executed under the order, but which order is not other-

wise proved, may be met by a notice under sec. 17 of the Ejectment Act. 6. And *Held*, that irrespective of the objections raised to the proof of their paper title, the plaintiffs had sufficient title as against the defendants who had entered upon the peaceable possession of the plaintiffs, or their grantors. 7. Per GWYNNE, J.—A deed may be proved by comparison of the handwriting of the signature with the signature of another deed which is produced and received in evidence as an ancient document, but the handwriting of which is not otherwise proved.—*Thompson v. Bennett*, 393.

See ACCORD AND SATISFACTION—ADMISSIONS—BILLS OF EXCHANGE AND PROMISSORY NOTES, 1, 2, 3, 4, 6.—COMMISSION MERCHANTS—COUNSEL—CRIMINAL LAW, 3—HUSBAND AND WIFE—INSANITY—INSOLVENCY, 5.—LIMITATIONS, STATUTE OF—POSSESSION—REPLEVIN—SALE OF GOODS.

EXCESSIVE LEVY.

Action for.—See EXECUTION.

EXECUTION.

Action for excessive levy—Omission of words "maliciously and without probable cause"—Pleading.—Declaration (2nd count), that defendants having recovered said judgment and execution against plaintiff and others, as in 1st count mentioned, plaintiff and said others made payments from time to time and otherwise satisfied portions thereof, until on or about, &c., plaintiff and said others, by such payments and satisfaction, had paid and satisfied said judgment debt, &c., over and above the amount so credited on said execution, as in 1st count mentioned,

save and except a small amount, not exceeding about \$20: yet defendants, well knowing, &c., and notwithstanding the small amount due, but contriving and intending to injure and aggrieve plaintiff, thereafter, to wit, &c., *wrongfully and unjustly*, and by the pretence that there was a large amount due, to wit, &c., caused the sheriff to take and seize certain goods of great value, to wit, &c., of plaintiff's, and to make thereout \$200, &c., &c.

Held, on demurrer, bad, for not alleging that the act complained of was done maliciously, and without probable cause.—*Ventris v. Brown et al.* 345.

EXECUTORS AND ADMINISTRATORS.

1. *Action for injury to the person—Death of defendant—Suggestion of death.*—Plaintiff sued defendant, owner of a steamer carrying passengers for hire, charging that plaintiff was received by defendant as a passenger from T. to N., for safe carriage, for reward, but defendant did not safely carry plaintiff, who was in consequence seriously injured, &c. There was a second count charging it to have been defendant's duty to stop at the wharf at N., and to provide safe and proper gangways, but that defendant refused to stop, to enable plaintiff to land in safety, and neglected to provide a safe gangway, or other means, and a reasonable opportunity for plaintiff to land, in consequence of which plaintiff, in landing at said wharf, was thrown down and injured, &c.

After the commencement of the action defendant died, and plaintiff entered a suggestion on the record, but, *Held*, that the action died with defendant, and could not be

revived against his executor.—*Cameron v. Milloy*, 331.

2. *Held*, that a declaration was not bad for averring a promise by testator to perform certain work and afterwards by defendants, as executors, to finish same, testator having died before time for completion expired.

The 7th plea stated that after testator's contract and promise, it was agreed between him and plaintiff in his lifetime that he should not perform them, but instead testator should deliver to plaintiff, who was to accept, a different boiler and engine, larger and more valuable, requiring a longer time for construction, and afterwards, before action, testator in his lifetime, and defendants, as executors, did make and deliver to plaintiff, who accepted same upon such terms, and paid the price thereof:

Held, bad.—*Leonard v. Northey et al.* 11.

EXECUTORY DEVISE.

See WILL.

FACTORS.

Advances on goods consigned for sale—Right to recover.—*See COMMISSION MERCHANTS.*

FIRE.

Destruction of premises by—Determination of term thereby—*See LANDLORD AND TENANT*, 1.

FIXTURES.

Separate mortgages on land and fixtures—Refiling chattel mortgage.—The owner of land upon which there are fixtures, such as machinery in a mill, has the right to

sever the chatteis from the realty; and therefore a chattel mortgage by him upon the fixtures was *Held* not to be prejudiced by his subsequent mortgage of the land.

The chattel mortgage was not refiled within the year; but within the year the mortgagor having sold the fixtures, the purchaser gave the mortgagee a chattel mortgage of the same in substitution of the original mortgage, containing a recital of that mortgage, and of the sale of the fixtures to him subject thereto, and that he had obtained an extension of time on condition of giving this mortgage for the sum unpaid.

Held, that the omission to refile did not give the mortgagee of the land priority, for he could not be considered a "subsequent mortgagee in good faith for valuable consideration," within the statute; and that the prior severance of the fixtures continued down to the giving of the second mortgage, which carried it on by its recitals and legal effect.

Semble, that if the chattel mortgage were paid off, the mortgagee of the realty would then be entitled to the fixtures.—*Rose v. Hope et al.* 482.

FOREIGN CURRENCY.

[*Note payable in.*].—See **BILLS OF EXCHANGE AND PROMISSORY NOTES**, 2.

FORMER RECOVERY.

1. *Bill in Equity to restrain similar action—Dismissal for different causes—Obstructing right of way—Former recovery of same—Equitable pleading.*].—In an action for penning back water upon plaintiff's land plaintiff replied to defendant's sixth

plea that a former action had been brought by her against defendant for a similar penning back of the water: that defendant had filed his bill to restrain that action, and had in that bill alleged the same matters now alleged in sixth plea, which bill was dismissed.

Rejoinder, that the Court of Chancery gave no judgment in respect of matters alleged in sixth plea, but dismissed bill in respect of other matters:

Held, on demurrer, rejoinder good.

The 3rd and 4th counts charged defendant with obstructing the plaintiff's right of way from his land over lot 14 to a highway, and back again from highway over lot 14 to plaintiff's land. To a plea denying plaintiff's right to the way, plaintiff replied, by way of estoppel, a former recovery against defendant for obstructing a right of way then claimed by plaintiff from her said land "over lot 14 to a highway, and back again from the highway over lot 14 to plaintiff's land."

Held, on demurrer, replication good, for that the issue was as to the existence of *any* right of way in plaintiff over lot 14, and that was determined by former recovery.—*Dean v. Gray*, 203.

2. *Estoppel by judgment recovered.*].—To an action on defendant's covenant in a lease, as surety of lessee, defendant pleaded by way of estoppel, that previous to this action the lessee sued the lessor in the County Court, alleging that by the lease, in the event of total destruction of the mill by accidental fire the term should cease, and the rent be apportioned: that upon such destruction on the 30th October, 1869, the said term ceased, and the lessor became liable

to refund to the lessee such part of the rent paid in advance as on a just apportionment should be found due, and the lessee alleged in such action that \$137.50 thus became due to him, for which he sued therein: that the lessor, the now plaintiff, pleaded in such action that the said lease was not his deed, and issue being joined thereon the lessee recovered judgment for the said sum of \$137.50. The plea then alleged that the judgment remained in force, and that the rent sued for in this action was rent accruing due after the said 30th October, 1869.

Held, a good plea; that the judgment recovered, if a bar to the recovery of this rent against the principal, was a good defence for the surety; and that such judgment was a bar, for though the plea of *non est factum* did not put in issue the destruction of the mill and consequent determination of the term, yet these facts being necessarily averred in that action, and not denied, the lessor was now estopped from disputing them.

Held, also, that the replication to this plea, being the same as to the first plea, was bad for the same reasons.—*Taylor v. Hortop*, 542.

FRAUD.

Action on promissory note—Plea of fraud and want of consideration—Non-repudiation of contract.—In an action on a promissory note, evidence was given to shew that defendant was induced to give the note upon misrepresentations, on the part of the payee and indorser, as to the formation of a company, for the sale of a patent right, controlled by the payee, the note being given in consideration

of a share which defendant was to have in such company, of which plaintiff's testator was alleged to be one; but it was doubtful whether any such company existed at all, or if so, whether defendant was ever placed in the position of becoming a shareholder:

Held, that the defendants not having repudiated and rescinded the contract, under which the note was given, did not preclude him from setting up the defence that it had been obtained from him by the fraud, covin, and misrepresentation of the payee, and that the latter had indorsed it without value to the testator, who was in fact aware of the circumstances under which it had been obtained; for that from the nature of the transaction there was nothing on his part to be repudiated or rescinded.—*Waddell et al. v. Jaynes*, 212.

See MISREPRESENTATION.

FRAUDS (STATUTE OF.)

Sale of goods—Verbal agreement not to be performed within a year.—Plaintiff entered into a verbal agreement with defendant for the purchase of a piano at a certain price, and upon certain terms of payment, defendant agreeing to guarantee that the instrument was then free from defect and should so continue for five years, and that in case of its becoming defective within that period, defendant would, upon plaintiff's returning it within that time, refund the purchase money:

Held, reversing the judgment of the County Court, a contract not to be performed within a year, and therefore void under the Statute of Frauds, as not reduced to writing.—*Nicholls v. Nordheimer*, 48.

GOODS—SALE OF.

See SALE OF GOODS.

HARBOUR COMPANY.

See CORPORATIONS, 2.

HIGHWAYS.

1. *Liability to repair.*—By 9 Vic. ch. 38, sec. 23, the road in question for an injury resulting from the disrepair of a portion of which, passing through defendants' incorporated limits, they were sought to be made liable, was placed under the control and management of the Board of Works, and by 13 & 14 Vic. ch. 15, Government had power to divest the Board of Works of such control by proclamation in the "Provincial Gazette," whereupon the road again became under the control and management of the local municipalities in which it was situate. In 1851 the County Council by by-law assumed the road under the Municipal Corporation Act, and kept it in repair until 1838, when they repealed the by-law. From that time down to the occurrence of the accident which caused the injury complained of, a period of twelve years, the defendants undertook the duty of repairing the road which was within their limits.

Held, that it was to be presumed that the board of works had been in due form of law divested of all control and management of the road, and that the piece in question had properly passed under the jurisdiction of the defendants, and that they were bound to keep it in repair.—*Irwin v. Corporation of Bradford*, 18.

The judgment in this case was affirmed in Appeal. DRAPER

C. J., OF APPEAL, dissenting.—*Irwin v. Corporation of Bradford*, (In Appeal,) 421.

2. *Injury caused by draining, and felling timber—Liability of municipality—Pleading.*—[*Held*, on demurrer to the pleas set out in this case, that a municipality cannot, for the purpose of repairing or draining a highway, commit an injury to private property, by collecting and conveying water to it, and shelter themselves from liability under their statutable obligation to keep the road in repair:

Held, also, that a similar statutable duty of opening the road upon which they grew, was no answer to an action for injury caused to plaintiff's land by the felling of trees, accompanied by the allegation that in so opening the road a portion of the trees, in being cut and felled, necessarily reached to and fell upon plaintiff's land, but doing said land, &c., no unnecessary and no material injury, &c.—*Rowe v. Corporation of Rochester*, 319.

3. *Bridge—Liability to repair—Municipal Act 1866, secs. 338, 339—Construction.*—Where a bridge connecting two highways was dedicated to the public and in public use for a number of years, forming part of a thoroughfare on which houses had been built, for which it was the only direct mode of communication to the south, and for nine or ten years had been repaired by the municipality out of the public funds, although no by-law had been passed establishing or assuming it:

Held, that the municipality were bound to keep it in a proper state of repair.

Held, also, that sec. 339 of the Municipal Act of 1866 does not

take away the common law liability.

Semble, that said section only declares the intention of the Legislature that the mere laying out of a road or the building of a bridge by private owners, should not by itself impose a criminal or civil liability on the municipality, or on the public represented by them.—*Regina v. Corporation of Yorkville*, 431.

4. *Public way—Action for obstruction—Special damage.*]—To maintain an action for obstructing a public way, the plaintiff must shew some substantial damage peculiar to himself, beyond that suffered by the rest of the public who use the way. The plaintiff here proved no such damage beyond being obliged in common with every one else who attempted to use the way to pursue his journey by a less direct road.

Held, following *Winterbottom v. Lord Derby*, L. R. 2 Ex. 316, that he had no right of action.

At the trial defendant raised no objection on the above ground, but denied the existence of the alleged highway, and the jury found in his favor. *Held*, that he might nevertheless, support his verdict on this ground, it being admissible under not guilty.—*Baird v. Wilson*, 491.

See MUNICIPAL CORPORATIONS.

HUSBAND AND WIFE.

1. *Incompetency of husband and wife under Evidence Act of 1869*, 33 Vic. ch. 13, O.]—*Held*, where husband and wife are parties to the record, their evidence, since 33 Vic. ch. 13 O., is inadmissible either for or against each other.—*Storey et al. v. Veach et al.* 164.

2. *Married woman—Liability on contracts*—35 Vic. ch. 16—*Construction of.*]—*Held*, that under 35 Vic. ch. 16, sec. 9, O., an action at law may be maintained against a married woman in respect of a debt incurred by her upon the faith of her separate estate before the passing of the Act.

HAGARTY, C.J., dissenting, on the ground that sec. 9 applies only to debts incurred after the passing of the Act.

Quære, as to the means of enforcing the judgment in such an action, where the separate estate consists of money to be paid into her hands by trustees.—*Merrick et al. v. Sherwood*, 467.

Action by.]—See DEFAMATION.

See COUNSEL—NEGLIGENCE—TENANT BY THE CURTESY.

IDENTITY.

Presumption of.]—See EVIDENCE.

INDEPENDENT COVENANTS.

See COVENANTS.

INDICTMENT.

See CRIMINAL LAW, 1, 2.

INFORMATION.

See CRIMINAL LAW, 2.

INN-KEEPER.

Not a trader within Insolvent Act.]—See INSOLVENCY, 6.

INSANITY.

Evidence of.]—In this case a mortgage given in 1848, by a mortgagor who died in 1855, was impeached on the ground of insanity:

Held, that a rational act (the giving of the mortgage) being proved by testimony not impeached to have been done in a rational manner, and a security given for a valuable consideration, under no suspicion of unfairness or knowledge by the mortgagees of the alleged insanity, the transaction could not be upset by general evidence of insane delusions, expressions, and conduct ranging over a number of years, but none of it bearing on the time when the mortgage was made or in any way approaching the impeached dealing; and the jury on such evidence having found the mortgage void, and rendered a verdict for the plaintiff, a nonsuit was ordered.—*Campbell et al. v. Hill*, 526.

See EVIDENCE.

INSOLVENCY.

1. *Schedule of debts—Pleading.*—To an action of covenant in a mortgage to pay money, defendant pleaded that, becoming insolvent after execution of the mortgage, he made an assignment; that plaintiff's claim was known as that of the "Wood Estate," and was so described in the schedule submitted to the assignee and creditors; that plaintiff resided abroad, and was represented in Canada by M., who had notice of the appointment of said assignee; that on the expiry of a year defendant obtained his discharge absolutely, by which he was discharged from plaintiff's claim.

Replication, that the order for discharge was made before 1st September, 1869, and that plaintiff's name was not mentioned as creditor in any schedule, and his claim was never proved against defendant's estate.

Rejoinder, that plaintiff's claim was known as that of the "Wood Estate" (plaintiff representing and being entitled to said estate) and was so entered in the schedule filed by defendant with assignee, and that plaintiff was represented by M., who had notice, &c.

Held, on demurrer, rejoinder good.

King v. Smith, 19 C. P. 319 distinguished.—*Farrell v. O'Neill*, 31.

2. *Failure to schedule debt—Pleading.*—To an action on a guarantee, defendant pleaded his insolvency and issue of an attachment, and that, not having procured assent of creditors, he did, after a year from date of issue of attachment, apply to Judge for discharge, which was absolutely granted after hearing defendant and creditors.

Replication, that defendant, before making of order of discharge, did not schedule plaintiff's claim, nor did he by a supplementary or any list of creditors, previous to making of said order, set forth plaintiff's claim, which was not, in fact, ever furnished to the assignee or proved against defendant's estate:

Held, following *King v. Smith*, 19 C. P. 319, and reversing the judgment of the County Court, replication good.—*Palmer v. Baker*, 59.

3. *Appeal—Jurisdiction of Judge over removed assignee.*—J. was appointed official assignee of B. under the Insolvent Acts of 1864–1865. After the Insolvent Act of 1869 came into force, the creditors removed him and appointed another assignee in his place. Before his removal, J. rendered an account of his receipts and disbursements, with which the creditors were dis-

satisfied, and presented a petition to the Judge to examine the account, to settle and adjust it, and to order J. to produce the books, papers and vouchers of the estate, and to pay over all moneys which might be found to be in his hands. The Judge held that the assignee, having already rendered an account, must be taken to have "fully accounted" within the meaning of the Act of 1864; that he had no jurisdiction over the removed assignee under that Act; and that he could not proceed under the Act of 1869, as the relief sought was not a "matter of procedure merely," and he dismissed the petition:

Held, on appeal, 1, that the summary remedies given by the Act of 1869 are applicable to assignees appointed under the Acts of 1864-1865; 2, that the Judge had jurisdiction even under the Act of 1864 to examine into and decide upon the correctness of the items of an assignee's account, and to adjust such account; 3, that this jurisdiction exists over a removed assignee until he has "fully accounted" for his acts and conduct while he remained assignee; 4, that an assignee has not fully accounted within the meaning of the Act by rendering an account merely, but that the expression necessarily means accounting and paying over; 5, that the "duties" of an assignee are to conform himself to the law; and the performance of these duties may under either Act be summarily enforced by the Judge, and a removed assignee remains subject to this jurisdiction until he has fully accounted for his acts and conduct while he remained assignee.—*In Re Botsford*, 65.

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4. *Prior distress for rent*—32 & 33 Vic. ch. 16, sec. 81—*Construction*.]—The 81st section of the Insolvent Act of 1869 (32 & 33 Vic. ch. 16) does not restrict the landlord to one year's rent, where he has distrained for more *before* the insolvency of the tenant, but he is entitled to all that is due within the limitation of six years,

Griffith v. Brown, 21 C. P. 12, distinguished.—*Mason v. Hamilton*, 190.

The judgment in this case, as to the construction of section 81 of the Insolvent Act of 1869 (32 & 33 Vic. ch. 16, sec. 81), reversed in Appeal.—*Mason v. Hamilton*. (*In appeal*) 411.

5. *Action against insolvent*—*Plea of discharge*—*Concealment of assets*—*Evidence*.]—In an action on a promissory note, with a plea of discharge under the Insolvency Act, and replication that the discharge was obtained by fraud, inasmuch as defendant had concealed from the assignee certain promissory notes, it appeared from his own evidence that defendant, several months before his assignment, which was voluntary, desiring to raise money on his farm, one-fifth of which belonged to his wife, the value of her interest not being stated, gave his wife at least \$300 of notes, she otherwise refusing to consent to a mortgage of the farm. It further appeared that defendant had attempted to collect the notes, as he alleged, for his wife, and that the mortgage had been nearly paid off, but by what means was not shewn:

Held, affirming the judgment of the County Court, that the plaintiff was on this evidence entitled to recover.—*Golloghy v. Graham*, 226.

6. *Innkeeper not a trader.*]—*Held*, reversing the judgment of the County Court, that an inn-keeper is not a trader within the meaning of the Insolvent Act of 1869.—*Harman v. Clarkson*, 291.

7. *Deed of composition and discharge—Action by non-signing creditor—Pleading.*]—*Held*, on exceptions to the plea set out in this case that a deed of composition and discharge, made without any proceedings in insolvency (before or after) without any assignee being appointed, and apparently wholly outside the Insolvent Court, cannot be a bar to non-assenting creditors.—*Green v. Swan*, 307.

See DAMAGES.

INSURANCE.

1. *Mutual Insurance—Premium note current at time of Assignment—Assignee ignorant of non-payment—Pleading.*]—The non-payment of a cash premium note given by the original assured in a Mutual Assurance Company, the Company, having assented in writing to the assignment, cannot be set up against the assignee and alienee of the policy the note being current at the time of assignment, and the alienee or assignee not being aware of its existence or non-payment.—*Storms v. Canada Farmers' Mutual Insurance Co.*, 75.

2. *Mutual Insurance—Encumbrance—Defective pleading—Right to recover*]—To an action on a mutual fire policy, defendants pleaded charging plaintiff with having represented that he held the premises in fee simple, not alleging that he made any statement as to encumbrances or outstanding equities, but merely negating the truth of his

statement in this way, that “the plaintiff had not a title in fee simple,” with this addition, “and the true title was not nor is expressed in said policy, or in the application:”

Held, that on this issue plaintiff was entitled to recover, notwithstanding it appeared that there was an outstanding mortgage upon the property.—*White v. Agricultural Mutual Insurance Co.*, 98.

JOINT STOCK COMPANY.

Mortgage of Tolls—Foreclosure—Action for tolls in whose name.]—See CORPORATIONS, 2.

JUDGMENT RECOVERED.

Estoppel by.]—See FORMER RECOVERY.

LANDLORD AND TENANT.

1. *Lease—Destruction of premises by fire—Determination of term thereby—Principal and surety.*]—Action on defendant's covenant as surety of a lessee, under a lease of a mill for nine years from 15th December, 1868, at a yearly rent, payable half-yearly in advance on the 15th June and December, in each year, alleging non-payment of three half-yearly instalments of the rent reserved.

Plea, on equitable grounds, that defendant covenanted as surety only: that by the lease it was agreed that in case of the total destruction of the mill by accidental fire, &c., the lease should at once cease and be at an end: that the lessee paid all rent due up to the total destruction of the premises by fire, including the half-year's rent due on the 15th June, 1869; and that the premises were so

destroyed on the 30th October, 1869, whereupon the term ceased, and was at an end.

To this the plaintiff replied, that after such fire, the lessee, with the knowledge and approval of the defendant, continued to hold and occupy, and still holds and occupies the premises under and by virtue of the lease, and with the like knowledge and approval of the defendant, would not and did not put an end to the said term or surrender said premises.

Held, plea good, for defendant's covenant being restricted to the term ceased with it; and that the replication was bad, as shewing at most the creation of a new tenancy, to which the covenant would not extend.—*Taylor v. Horstop*, 542.

2. *Rooms let out to lodgers—Defective passage—Liability of owner.*—Defendant, the owner of a house, leased to the plaintiff a room in it, the only mode of access to which, and to the other rooms on the same story, was by a certain passage, in which there was an uncovered stove-pipe hole. The plaintiff having agreed with the defendant to change into an adjoining room, was in the act of moving her furniture, when she slipped into this hole and was injured.

Held, that the defendant was not liable, for in the absence of express contract he was under no legal obligation to keep the premises in repair.

The plaintiff was aware of the existence of this hole when she took the room. *Quære*.—Whether such knowledge, and her omission to cover it, was not evidence of contributory negligence which would have prevented her recovery.—*Humphrey v. Wait*, 580.

Liability of Landlord.] — See DISTRESS.

See FORMER RECOVERY—MONEY PAID, 1—PLEADING, 1.

LAPSE OF TIME.

When should be stated as reason against appeal.]—See APPEAL.

LARCENY.

Of Police Court information]—See CRIMINAL LAW, 2.

LEASE.

See LANDLORD AND TENANT.

LEAVE AND LICENSE.

Breach of contract—Pleading]—As an answer to the declaration for breach of contract set out in this case defendants pleaded (3rdly) that testator, and defendants as executors, since his death, made all the variations from the plans and contracts in the declaration mentioned by the leave and license of plaintiff and his agent: *Held*, bad, among other reasons, because leave and license cannot be pleaded to a breach of contract.—*Leonard v. Northey et al*, 11.

LIBEL AND SLANDER.

Provocation by libel.]—See ASSAULT.

Words not set out]—See DEFAMATION.

LICENSE TO SELL LIQUOR.

Quashing of by-law under which issued — Conviction for selling quashed.]—The quashing of a by-law, under which a certificate has been granted and license issued for the sale of spirituous liquors, does not nullify the license: and a con-

viction for selling without license cannot, therefore, under these circumstances, be supported.—*Regina v. Stafford*, 177.

LIMITATIONS, (STATUTE OF.)

1. *Ejectment—Tenancy at will.*—

In ejectment, it appeared that a son of plaintiff's ancestor had, some three years before the latter's death in 1850, at his instance, moved on to the land in question, for the purpose of working it for him. No rent appeared to have been ever paid by the son :

Held, that there was nothing in this evidence to shew a tenancy at will between father and son, and that the Statute of Limitations did not therefore begin to run against the father during his lifetime, and, consequently, that the plaintiffs, his grandchildren, who were then infants, and claimed under the eldest son, were not affected by it.—*Rumrell et al v. Henderson et al*, 180.

2. *Tenant at will.*—A. & B. being the owners in fee of certain lands, sold them to C., and in 1836 executed conveyances, but continued in possession as before. In 1850 D., claiming to hold a deed for the lands, executed by the heir at law of C. then dead, got possession of the lands from A. & B., under the belief that he was the grantee of C's heir at law. D. then conveyed the lands to defendants, or to persons under whom they claimed. These went into possession till 1868, when the real heiress of C. brought ejectment against them, who claimed by possession. It appeared that the deed executed by D. was a fraudulent instrument not executed by C's heir-at-law, but by some stranger :

Held, that the title of Q. was barred by the Statute of Limitations—*Butterfield et ux. v. Maybee et al.*, 230.

3. *Possession of wild land—Evidence.*—The principle laid down in *Heyland v. Scott*, 29 C. P. 165, and *Davis v. Henderson*, 29 U. C. R. 345, as to the exercise of acts of ownership over wild land, sufficient to establish a possession under the Statute of Limitations, recognized and acted upon ; and *Held*, that the evidence set out in this case was sufficient to bring it within the Statute of Limitations.—*Mulholland v. Conklin*, 372.

4. *Ejectment—Evidence.*—On the 9th January, 1844, one J. W. took possession of the land in question under an indenture of lease, for four years, executed by C. the owner, under power of attorney, at the rent of £15 a year. This instrument also contained the right to purchase for £250, £50 to be paid on the execution of the instrument, and the balance in four instalments of £50 each, on the 9th January in each year, the first payment to be made on the 9th of January, 1845 ; and if purchase carried out, in lieu of the rent reserved a sum equal to six per cent. on the original purchase money should be paid. J. W. made the first payment of £50 at the time of executing this instrument, and deposited £50 in the bank to meet the second but the person in whom the legal estate was vested having died, it was not paid, and nothing more was done. J. W. remained in possession until his death in 1850, when he was succeeded by his son to whom it appeared that he had previously sold, and the son conveyed to the defendants, who

entered, and had been in possession ever since.

Held, that H., the plaintiff, claiming under C.'s will, was barred by the statute.

Held, also that the fact of the son shewing to the defendants when he sold to them a letter written by C.'s attorney at the time of his father's purchase, to the person then in charge of the land to deliver possession to his father, did not create a new tenancy at will between the defendants and C.

Held, also, that the execution of a deed in 1862 by J. W.'s heir-at-law to one R., who in 1869 conveyed to the plaintiff, did not defeat the defendants' title, as they were in possession not in privity with him.—*Cahuac v. Scott*, 551.

LIQUORS.

See LICENSE TO SELL LIQUORS.

LUNACY.

Orders in under Imperial Act, 2 Geo. IV., and 1 Wm. IV., ch. 60.]

See EVIDENCE.

Evidence of.—See INSANITY.

MARRIED WOMAN.

See HUSBAND AND WIFE.

MEMORANDA.

114, 278, 410, 560, 609.

MISJOINDER OF COUNTS.

See CRIMINAL LAW, 2—LEAVE AND LICENSE.

MISREPRESENTATION.

Action on a promissory note—Compromise of another note on the assurance that it was the only claim—Pleading.—Declaration against the defendants as executors of one K.

upon a promissory note for \$2,600, made by K. on the 17th Sep., 1867, payable to the plaintiff, or bearer, four months after date.

Plea, on equitable grounds, that the plaintiff in 1869, brought an action against K. on a note for \$5000, alleged to have been made by K., payable to plaintiff; that after K.'s death the case was revived against defendants, who pleaded that the note sued on therein was not made by K.; that such cause of action was settled before trial between the plaintiff and the defendants by a compromise, and defendants paid \$2000, in full satisfaction of the plaintiff's claim on said note; and the defendants averred that this settlement was agreed upon as a compromise and settlement of all claims of the plaintiff against K. and his estate, and upon the assertion of the plaintiff that the claim in said action was his whole and only claim against such estate.

Replication, upon equitable grounds, that the agreement mentioned in the deed is in the words following—setting forth verbatim a deed-poll executed by the plaintiff, whereby, after reciting that the plaintiff had commenced an action against the defendants upon a note for \$5000, and that it has been agreed "*to settle said suit*" for \$2000, the plaintiff, for the consideration aforesaid, released the defendants and the estate "from all the payments of said note," and from all costs connected therewith and the prosecution of said suit.

Rejoinder, upon equitable grounds, that the release set forth in the replication was executed by the plaintiff and accepted by the defendants, and the moneys therein mentioned agreed to be paid, and paid upon the plaintiff's assertion

and assurance that the claim in said action in the plea mentioned was the whole and only claim against the estate of K., and it was only on the faith thereof that defendants accepted the said release, and agreed to pay the said money.

Upon demurrer to the rejoinder, and exception to the plea and replication: *Held*, 1. That the rejoinder was bad (1), as admitting that the agreement, alleged in the plea to have been a compromise of all claims, was the document set out in the replication, which was confined to the other suit, and yet relying on the averment that such compromise was procured by the plaintiff's assertion that he had no other claim; and (2) because the compromise of a claim upon the plaintiff's assertion that it is the only one, will not of itself form an equitable defence to another claim, the right to recover in respect of which is not otherwise contested.

2. That the replication was bad as it admitted that the compromise, which was stated in the plea to include all claims, was the release set out in the replication, which was confined to a particular suit, and as offering no answer to the plea.

3. That the plea itself was bad, and open to the exceptions taken to it.—*King v. Miller et al.*, 450.

MISTAKE.

Mutual mistake—Equitable pleading.—To an action of covenant in a lease, defendant pleaded, in substance, on equitable grounds, that by mutual mistake the covenant declared on was inserted in the lease in different terms from what both parties had agreed upon, intended and supposed when the lease was executed, and that read-

ing the covenant as it should have been, there was no breach thereof:

Held, GWYNNE, J., dissenting, plea bad.—*Shier v. Shier*, 147.

MONEY.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

MONEY PAID.

1. *Sale of land subject to mortgage—Demise by vendee to vendor—Assignment by vendor to third party—Payment of mortgage by assignee—Action against vendee for money paid to his use.*—P. conveyed certain land to defendant, "subject to a mortgage," and with covenant for quiet enjoyment, free from all incumbrances. Defendant then demised the same land to P. and wife for the term of their respective natural lives, and P. granted and assigned to plaintiff all his right, title, and interest therein, to hold during the life of P. The mortgagees, or their assignee, brought ejectment against both plaintiff and P., when plaintiff paid the amount due under the mortgage, and then brought an action against defendant for money paid to his use: *Held*, that he could not recover in this form of action, but *Seem*, his remedy would be on the implied covenant for quiet enjoyment, contained in the life lease to P.—*Snyder v. Snyder*, 361.

2. Where in an action for contribution by first accommodation endorser against second, it appeared that one L., at the request of the plaintiff (the first endorser) took up the note, and the plaintiff afterwards repaid him. *Held*, that this was a payment by the plaintiff in discharge of the liability which

he and defendant had undertaken (they both having endorsed as mere sureties for the maker), and was sufficient to entitle him to recover in the action for contribution.—*Ianson v. Paxton*, 505.

MORTGAGE.

Sale of land, subject to.]—See MONEY PAID, 1.

Separate, on land and fixtures.]—See FIXTURES.

Chattel.]—See FIXTURES.

See REPLEVIN.

MORTGAGE OF TOLLS.

See CORPORATIONS, 2.

MORTMAIN (STATUTE OF).

9 Geo. 2, ch. 36—*Enrolment in Chancery unnecessary — Construction.*]—Held, following the series of authorities from *Doe Anderson v. Todd*, 2 U. R. C. 82, down to *Davidson v. Boomer*, 15 Grant, 1,218, that 9 Geo. 2, ch. 36, is in force in this Province, but that enrolment in Chancery is not necessary to validate a deed in other respects executed in compliance with that Act.—*Hambly v. Fuller*, 141.

MUNICIPAL CORPORATIONS.

1. *Assessment for street watering—By-law necessary—Resolution quashed.*]—There must be a *by-law* for the necessary assessment, for the watering of a street, passed *subsequently to, and consequent upon*, the presentation of the required petition therefor, and after the fullest opportunity given to any ratepayer to object to its passage, and a resolution for that purpose, passed by a municipal corporation under a *by-*

law antecedently made, and which authorized this mode of proceeding, instead of by *by-law*, was therefore quashed, but without costs, as the applicant had been one of the petitioners, was well aware of its object, had enjoyed the benefit of the resolution, and had been dilatory in complaining.—*In re Morell v. City of Toronto*, 323.

2. *Boundary of road allowance.*]—Held, that a municipal corporation has no power to declare certain posts planted by a surveyor to be the true boundaries of an original road allowance which they direct to be opened. They may give a description of the boundaries, but ought not to declare such boundaries to be the true boundaries, such being then a matter in dispute.—*Ex rel. McMullen v. Corporation of Caradoc*, 356.

3. *Undertaking to indemnify officer for lawful acts—Not liable for unlawful acts.*]—Held, that the fact of a municipal council having undertaken to indemnify an officer for *lawful* acts done in his official capacity, does not entitle him to look to them for indemnity against the consequences of *unlawful* acts, as for instance, in this case, of a wrongful distress; and that plaintiff could not be allowed to impeach the judgment of a competent Court by which he was held to be a wrongdoer.—*Irwin v. Corporation of Mariposa*, 367.

4. *Orders made at meeting of—Liability on—Pathmasters—Statute labor.*]—In trespass against a municipal corporation for the act of their pathmaster, in causing statute labor to be performed on certain land of the plaintiff, alleged by the defendants to be an original allowance for road, it appeared

hat the pathmaster acted under an order written by the clerk, by the direction of the council while in session.

Held, sufficient to render the corporation liable, and that a by-law was not necessary.—*Nevill v. Corporation of Ross et al.* 487.

5. *Court House—Use of--Liability for.*—*Held*, that since the passing of the Law Reform Act, 32 Vic. ch. 6, sec. 22, O., reuniting the City of Toronto to the County of York, for judicial purposes, the city is not liable to pay the county any compensation for the use of the Court House.—*Corporation of York v. Corporation of Toronto*, 514.

See HIGHWAYS, 1, 2, 3.

MURDER.

On indictment for, conviction for assault quashed—See CRIMINAL LAW, 1.

MUTUAL INSURANCE.

See INSURANCE.

MUTUAL MISTAKE.

See MISTAKE.

NEGLIGENCE.

Action by and against husband and wife—Evidence merely conjectural—Right to address jury.—In an action by husband and wife for negligence of defendants, surgeons, in treatment of wife, the evidence was of a very weak and unsatisfactory character, amounting in fact to pure conjecture whether there had been any negligence or not; while the evidence offered on behalf of defendants was of the most favourable character to them.

Held, that, on plaintiffs' counsel declining to take a nonsuit, the

Judge was right in directing the jury to find for defendants, as also in refusing him the right to address the jury on the whole case.—*Storey et al. v. Veach et al.*, 164.

When action for survives against executors.—See EXECUTORS AND ADMINISTRATORS.

See LANDLORD AND TENANT.

NEW TRIAL.

At the trial of an action for obstructing a public way, defendant did not raise the objection that the plaintiff must show some substantial damage peculiar to himself beyond that suffered by the rest of the public who use the way, but denied its existence and the jury found in his favor.

Held, that he might nevertheless support his verdict on this ground, it being admissible under not guilty.—*Baird v. Wilson*, 491.

See PLEADING, 2.

NONSUIT.

Leave reserved to enter—Practice—Duty of Court—Where leave is reserved to enter a nonsuit on the whole case after evidence given on both sides, a nonsuit will be ordered unless there be evidence on which a rational verdict for the plaintiff can be founded, which the Court would not be bound to set aside.—*Campbell et al. v. Hill*, 526.

See HIGHWAYS, 1—INSANITY—VENUE.

NON TENUIT.

Plea of—Evidence admissible under.—See REPLEVIN.

NOTICE OF ACTION.

Held, following *Bross v. Huber*, 18 U. C. R. 282, that a notice of

action stating that the action would be commenced in the *Court of Queen's Bench or Common Pleas*, was insufficient.—*Nevill v. Corporation of Ross et al.* 487.

NOTICE OF DISHONOUR.

See *BILLS OF EXCHANGE AND PROMISSORY NOTES*, 3.

OFFICER.

Liability of Corporation for acts of.—See *MUNICIPAL CORPORATIONS*, 3, 4.

ORDERS.

Made at meetings of municipal corporations—Effect of—See *MUNICIPAL CORPORATIONS*, 4.

PARLIAMENTARY ELECTIONS.

See *ELECTIONS*.

PAROL EVIDENCE.

See *BILLS OF EXCHANGE AND PROMISSORY NOTES*, 4.

PATHMASTERS.

See *MUNICIPAL CORPORATIONS*, 4.

PAYMENT.

Receipt under seal—Conclusive evidence of.—See *ESTOPPEL*, 3.

PERSON.

Injury to—When right of action survives against defendant's executors.—See *EXECUTORS AND ADMINISTRATORS*, 1.

PLEADING.

1. *Lease—Covenant.*—To a declaration on a covenant in a lease,

alleging that defendant covenanted with plaintiff that he would during the term spend and employ, in a husband-like manner, upon the demised premises, all the straw which should grow thereon, and charging as a breach, that defendant drew away many waggon loads of straw which grew thereon, and used it elsewhere, defendant pleaded that the covenant in the declaration was not the whole of the covenant, but that it contained additional matter completely qualifying, as he contended, and in effect neutralizing that part of the covenant set out; the whole alleged covenant was then set out, with an averment that defendant had fulfilled it according to the true intent and meaning of the added part:

Held, on demurrer, plea bad.—*Shier v. Shier*, 147.

2. *Plea of puis darrein continuance—Waiver of other pleas on record—New trial.*—*Held*, on the authority of *Dunn v. Hill*, 11 M. & W. 470, &c., that the plea of *puis darrein continuance* operates as a waiver of all pleas remaining on the record yet to be tried; and it, therefore, appearing in this case, that if the plea of not guilty, which had been pleaded before the plea of *puis darrein continuance* had remained on the record, the plaintiff must have been nonsuited, a new trial was granted unless plaintiff would consent to reduce his verdict to nominal damages.—*Pender v. Byrne*, 328.

See *CONTRACT—DEFAMATION—EXECUTION—HIGHWAYS*, 2—*INSOLVENCY*, 1, 2, 7—*INSURANCE—LEAVE AND LICENSE—MISREPRESENTATION—REPLEVIN—SALE OF GOODS—STAMPS—WASTE*.

POLICE COURT.

See CRIMINAL LAW, 2.

POSSESSION.

Ejectment — Actual possession — Unoccupied land — Evidence.]—In ejectment, it appeared that plaintiff's grantor had cut timber on the land, had had the lines run by a surveyor, and then conveyed, claiming as owner; that then defendant had entered, not upon any actual possession, but the lot being unoccupied, and in a wild, uncultivated state; that there had been a prior occupation by defendant, at least as actual as that of plaintiff, but no occupation by any one for any period approaching twenty years:

Held, that on this evidence, any presumption in plaintiff's favour from any possession proved by him, was rebutted by the facts in evidence. — *Wallbridge v. Gilmour*, 135.

Of wild land.]—See LIMITATIONS, STATUTE OF, 3.

POSTMASTERS.

Right to vote at elections for House of Commons.]—See ELECTIONS.

PRACTICE.

See ARREST—NEW TRIAL—NON-SUIT—VENUE.

PRACTICE AT NISI PRIUS.

Right of counsel to address jury.]—See COUNSEL.

PREMIUM NOTE.

See INSURANCE, 1.

PRINCIPAL AND AGENT.

See COMMISSION MERCHANTS.

PRINCIPAL AND SURETY.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 6 — FORMER RECOVERY—LANDLORD AND TENANT, 1.

PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

PUIS DARREIN CONTINUANCE.

Plea of.]—See PLEADING, 2.

QUEEN'S COUNSEL.

Appointment of.]—560.

QUIET ENJOYMENT.

See COVENANTS FOR TITLE.

RAILWAYS.

1. *Government aid to*—34 Vic. ch. 2, sec. 3—"Construction"—*Meaning.*]—*Held*, that the defendants, who had contracted merely for the *grading and fencing* of a portion of their road before the date specified in sec. 3 of 34 Vic. ch. 2, were not disentitled to aid under that section, as having contracted for the *construction* of such portion of their road. — *McRae v. Toronto and Nipissing R. W. Co.*, 1.

2. *By-law in aid of*—*Ratepayers' assent not obtained*—*By-law quashed.*]—A by-law of a County Council, in aid of a railway, to the extent of \$20,000, which had not been submitted to the ratepayers under the Municipal Institutions Act of 1866, was, on that ground, quashed. — *Ex rel Clement v. Co. of Wentworth*, 300.

RATEPAYERS.

Assent required to by-law in aid of railway.—See RAILWAYS, 2.

RATIFICATION.

See SALE OF GOODS.

RECEIPT UNDER SEAL.

See ESTOPPEL, 3.

RENT.

See DISTRESS—INSOLVENCY, 4—LANDLORD AND TENANT.

REPLEVIN.

Avowry setting out several independent matters—Plea of non-tenuit—Evidence.—In replevin, to an avowry setting out a mortgage and demise to the mortgagor the entry thereunder, non-entry of mortgagee and non-exercise of power of sale, the permitting mortgagor to continue as tenant, and that while so occupying there was a large arrear of interest, &c., plaintiffs simply pleaded *non-tenuit*, and under it sought to give in evidence the fact of payment of the mortgage before distress, with a view to shewing that there was consequently no tenancy :

Held, (reversing the judgment of the Court below,) 20 C. P. 519, that this evidence was admissible.—*Royal Canadian Bank v. Kelly*, (In Appeal), 279.

REPORTER.

Appointment of, 609.

RESOLUTION.

For street watering—Sufficiency of.—See MUNICIPAL CORPORATIONS, 1.

RIGHT OF CONTRIBUTION.

Between accommodation endorsers.—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 6.

RIGHT OF WAY.

Obstructing.—See FORMER RECOVERY.

ROAD.

See HIGHWAY.

ROAD ALLOWANCE.

Right of Municipality to define boundary of.—See MUNICIPAL CORPORATIONS, 2.

RULES OF COURT.

266, 277, 561.

SALE OF GOODS.

When property passes—Pleading.—On the 27th April, 1872, at a meeting of the creditors of one A. R., deceased, at which his administrator was present, the plaintiffs entered into a written agreement to purchase on behalf of one M. the estate of A. R.; consisting of a stock of goods and other effects. This was signed by a number of the creditors, but not by the administrator, but the administrator at the trial swore that he considered it a sale to the plaintiffs. On the 6th May the plaintiffs sold to defendant this stock of goods, as shewn by the stock book, for the sum of \$7695.24, of which defendant paid in cash \$2782, and received a receipt therefor, on the back of which a memorandum was endorsed, that the balance was to be paid in notes at 3, 6, and 9 months; and defendant was to go

on the following morning to Ingersoll, where the goods were, and take possession. On the day of this sale the plaintiffs applied to and obtained from the administrator an order for the delivery of the key of the store in which the goods were on the person who held it, as well as an authority on M.'s behalf to sell the goods. On the following morning defendant, with one W., who was sent by the plaintiffs to assist, went to Ingersoll, when the defendant took possession, and while engaged in packing the goods up with a view to their removal they were destroyed by fire. M., who resided in Ingersoll, was well aware of the object with which the defendant came there, and at the trial swore that the plaintiffs were authorized to make the sale, and that he had been informed by telegraph of it and did not dissent.

Held, that the evidence clearly shewed that there was a sale by the plaintiffs to defendant so as to pass the property, for even if the plaintiffs had not at the time power to sell, yet the subsequent ratification by the administrator and M. related back so as to make it valid. • It was contended by defendant that the goods were to be checked with the stock book to ascertain the sum for which the notes were to be given. The jury found that this was no part of the bargain; but *semble*, that if it had been the property might still have passed, the checking being required only to ascertain the balance of the purchase money to be paid.

The declaration set out the contract and the terms of payment—namely, part cash and part by notes, at stated dates; and alleged that though defendant had paid

the sum payable in cash, he had not paid the balance by his notes or otherwise. *Held* sufficient, it not being necessary to declare specially for the non-delivery of the notes.—*Lockhart et al. v. Pannell*, 597.

See AUCTION—FRAUDS, STATUTE OF.

SALE OF LAND.

For taxes.]—See TAXES.

Subject to mortgage.]—See MONEY PAID.

See ESTOPPEL, 3.

SATISFACTION AND DISCHARGE.

See ACCORD AND SATISFACTION, 2.

SCHEDULE OF DEBTS.

See INSOLVENCY, 1.

SEPARATE ESTATE.

See HUSBAND AND WIFE.

SHEEP.

Seizure of for Rent.]—See DISTRESS.

SHIPPING.

Injury to vessel—Unregistered bill of sale—Right of registered owner to sue.]—Plaintiffs, being registered owners of a vessel, transferred her by bill of sale, which vendee neglected to register, and in an action by plaintiffs for injury, not of a mere temporary character, sustained by the vessel, vendee came forward as a witness on their behalf.

Held, that defendant could not set up vendee's right to defeat the action, plaintiffs under the Ship

Registry Act still appearing as legal owners.—*Wilson et al v. Cameron*, 198.

SLANDER.

See LIBEL AND SLANDER.

SPECIAL DAMAGE.

See HIGHWAYS, 4.

STAMPS.

Promissory note—Pleading.]—To an action by payee against maker of a promissory note, the plea was that there was not affixed thereto, at time of making, an adhesive stamp, or stamps of the required amount, or any stamps whatever, as required by the statute in that behalf:

Held, on demurrer, plea good. — *Escott v. Escott*, 305.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1.

STATUTES (CONSTRUCTION OF).

9 Geo II. ch. 36.]—See MORTMAIN, (STATUTE OF.)

11 Geo. IV.]—See EVIDENCE.

1 Wm. IV. ch. 60.]—See EVIDENCE.

9 Vic. ch. 38, sec. 23.]—See HIGHWAYS, 1.

12 Vic. ch. 197, sec. 12.]—See LIMITATIONS (STATUTE OF.)

13-14 Vic. ch. 15.]—See HIGHWAYS, 1.

14-15 Vic. ch. 99 (Imperial Act).]—See VESTING ORDER.

16 Vic. ch. 141.]—See CORPORATIONS, 2.
Consol. Stat. U. C. ch. 27, sec. 17.]—See EVIDENCE.

Consol. Stat. U. C. ch. 112, sec. 1.]—See CRIMINAL LAW, 2.

Consol. Stat. C. ch. 41, secs. 13, 16, 17 (Ship Registry Act).]—See SHIPPING.

27-28 Vic. ch. 17 (Insolvent Act, 1864).]—See INSOLVENCY, 3.

27-28 Vic. ch. 23.]—See CORPORATIONS, 1.

29 Vic. ch. 18 (Insolvent Act, 1865).]—See INSOLVENCY, 3.

29-30 Vic. ch. 52, secs. 338, 339, 349 (Municipal Act, 1866).]—See HIGHWAYS, 3.

—RAILWAYS, 2.

32 Vic. ch. 6, sec. 22 O.]—See MUNICIPAL CORPORATIONS, 5.

32 Vic. ch. 36, secs. 110, 131, 155, O.]—See TAXES, 1, 2.

32-33 Vic. ch. 16 (Insolvent Act of 1869).]—See INSOLVENCY, 3, 6.

32-33 Vic. ch. 16, sec. 81 D.]—See INSOLVENCY, 4.

32-33 Vic. ch. 21, sec. 18 D.]—See CRIMINAL LAW, 2.

32-33 Vic. ch. 22, sec. 12 D.]—See CRIMINAL LAW, 3.

32-33 Vic. ch. 29, secs. 5, 32 D.]—See CRIMINAL LAW, 1, 2.

33 Vic. ch. 13 O.]—See COUNSEL.

34 Vic. ch. 2, sec. 3 O.]—See RAILWAYS, 1.

34 Vic. ch. 11, sec. 4 O.]—See APPEAL.

35 Vic. ch. 12 O.]—See ASSIGNMENT.

35 Vic. ch. 13 O.]—See HUSBAND AND WIFE, 1.

35 Vic. ch. 16 O.]—See HUSBAND AND WIFE, 2.

STATUTE LABOR.

See MUNICIPAL CORPORATIONS, 4.

STOCK.

Subscription for.]—See CORPORATIONS, 1.

SUBSTITUTING CONTRACT.

See CONTRACT.

SURETY.

See PRINCIPAL AND SURETY.

TARIFF OF FEES.

267, 277, 561.

TAXES.

1. *Sale of land for—Whole lot previously assessed—Subsequent, assessment of half, and apportionment*

of taxes between both halves—Collector not bound to search for distress—32 Vic. ch 36, O.—Treasurer's list, its contents, and time of furnishing—Quantity need not be described—Party assessed may purchase.]—A lot, previously assessed as to the whole, was on claim made to half of it, assessed as to this half, and the taxes of previous years apportioned between both halves: *Held*, that there was no objection to this.

Where land is assessed and taxes imposed, an omission by the collector to demand and levy the amount from property on the premises, cannot, since 32 Vic. ch. 36, avoid the sale.

The treasurer's list, under secs. 110 and 131 of the above act, is sufficiently furnished at any time during the month of February.

This list need not contain the amount in arrear.

A designation, in the list, thus "the N. or W. $\frac{1}{2}$ 14," *held* sufficient.

It is not necessary at a sale of land for taxes to describe particularly the portion of the land to be sold, and therefore a sale of "89 acres" of a particular lot was *held* sufficient.

The party assessed may become the purchaser of the land sold for taxes.—*Stewart v. Taggart*, 284.

2. Sale of land for—32 Vic. ch. 36 sec. 155, O., construction of,]—*Held*, that sec. 155 of 32 Vic. ch. 36, O., does not make valid a deed given in pursuance of a sale for taxes where there were in fact no taxes in arrear at the time of sale.—*Hamilton v. Eggleton*, 536.

TENANT

For life.]—See WASTE.

At will.]—See LIMITATIONS (STATUTE OF) 1, 2.

TENANT BY THE CURTESY.

Crown deed—Married Woman—Tenancy by the curtesy—Entry unnecessary.]—Where a married woman claims under letters patent from the Crown, her husband need not have entered upon the land in order to entitle him to tenancy by the curtesy, the letters patent, *suo vigore*, constituting seisin in fact.—*Weaver v. Burgess et al.*, 104.

TIMBER.

See HIGHWAYS, 2.

TOLLS.

See CORPORATIONS, 2.

TRADER.

Inn-keeper not within Insolvent Act.]—See INSOLVENCY, 6.

TRESPASS.

Evidence to connect defendant with.]—See DISTRESS.

See DAMAGES.

TRIAL.

See HUSBAND AND WIFE.

TRUSTEES.

Deed to.]—In a deed conveying land to trustees for a specified purpose there was provision made for a new appointment in the case of a trustee ceasing to belong to a certain religious persuasion; *Held*, that upon the happening of that event, in the case of the last surviving trustee, the estate did not *ipso facto* become divested, but the intention of the grantor plainly being that it should go over

to new trustees, this could only be effected by the surviving grantee conveying to them.—*Hambly v. Fuller*, 141.

UNOCCUPIED LAND.

See POSSESSION.

VENDOR AND VENDEE.

See MONEY PAID, 1.

VENUE.

Defect on face of record—Arrest of judgment—Nonsuit.]—*Held*, that defendants were not entitled either to nonsuit plaintiffs or arrest the judgment, on the ground that the venue was improperly laid, as, this being an objection patent on the face of the record, they should have demurred to the declaration.—*Irwin v. The Corporation of Bradford*, 18.

The judgment in this case affirmed in appeal, *DRAPER, C. J. OF APPEAL*, dissenting. *Irwin v. Corporation of Bradford (In appeal)* 421.

VESSEL.

Injury to—Right of registered owner to sue.]—See SHIPPING.

VESTING ORDER.

Held, that a vesting order of the Court of Chancery of England, proves itself on production, by the Imperial Act 14 & 15 Vic., ch. 99, and was, therefore, properly received in evidence.—*Cahuac v. Scott*, 551.

VOTERS.

Postmasters—Right to vote at elections for House of Commons.]—See ELECTIONS.

WARRANTY.

See AUCTION.

WASTE.

Tenant for life—Pleading.]—In an action by reversioner, against tenant, for injury to the reversion, caused by cutting down and carrying away trees and underwood, defendant pleaded his tenancy, under a demise from D., for 19 years; that at time of demise the land was chiefly wild and in a state of nature, and could not be used for farming purposes, for which it was demised, and defendant cut down and removed the trees, &c., upon a portion of the wild land, cleared, and made it fit for cultivation, fenced and cultivated it, making it productive and useful, and thereby improved the land in value and did not injure plaintiff's reversion.

There was a further plea alleging that D. was tenant for life by the curtesy, and defendant was seised of the reversion of the land, in fee simple, as tenant in common with plaintiffs and others; that D. demised to defendant, and the land being wild, &c. (as in the other plea); and defendant, being tenant under said demise, and seised of the reversion, as tenant in common, cut down, &c., and thereby cleared the land in the manner customary in the neighborhood, and generally in Ontario; and defendant improved the value of the land, and did not injure the reversion:

Held, on demurrer, both pleas bad; but the Court declined, under these pleas, to decide the question whether the law of England, as to waste by tenant for life, was applicable, in its integrity, to lands in

this Province. — *Drake et al. v. Wigle*, 341.

WATER.

Penning back—Action for.]—See *ESTOPPEL*, 1.

WAY.

See *HIGHWAYS*.

WIFE.

See *HUSBAND AND WIFE*.

WILL.

*Construction—Executory devise—*OR, *when to read AND.*]—By his will, dated 28th January, 1840, testator devised as follows: "I will and devise to my son C. all and singular, &c., (certain land), to be by him peaceably possessed and enjoyed for and during his natural life, and after his decease I will and devise the same to the heirs of the said C., and to their heirs and assigns forever; in consideration whereof I will, order, and direct, that the said C. shall pay yearly and every year unto his mother the sum of £25 during her widowhood; and also that he shall pay to his sister M. the sum of £25 yearly and every year, so long as she shall remain single." Then follows a devise to his son I. B. of certain lands in similar words; and then, after certain devises and bequests to others of his children, including a gift of £500 to his son R., there was this further provision, "And in the event of either of my sons C., I. B., or R., or either of my daughters S. or M., dying before they come of age, or without issue, then and in such case the legacies

herein devised and bequeathed to them shall be equally divided amongst the surviving ones, share and share alike."

Held—1. (MORRISON and WILSON, JJ., dissenting) that extrinsic evidence of the ages of testator's children was admissible for the purpose of aiding in the construction of the will. 2. (MORRISON and WILSON, JJ., dissenting), That C. having been over twenty-one years of age at the date of the will, and having died without issue, the gift over took effect as respected the land devised to him. 3. Per DRAPER, C.J., and GWYNNE, J.: The gift to C. was an estate in fee simple, subject to an executory devise over in the event of his dying without issue. Per WILSON, J., and MORRISON, J.: C. took a fee simple absolute. Per STRONG, V.C.: C. took an estate tail, with remainder over in the event of his dying without issue.—*Forsyth v. Galt et al.* (*In appeal*) 115.

WITNESS FEES.

See *TARIFF OF FEES*.

WORDS (MEANING OF).

Construction.]—See *RAILWAYS*, 1.

Duties of assignee—Fully accounted—Matter of procedure merely.]—See *INSOLVENCY*, 3.

Or, when to be read, and.]—See *WILL*.

Payable to my order.]—See *BILLS OF EXCHANGE AND PROMISSORY NOTES*, 4.

WORK AND LABOUR.

In answer to the declaration set out in this case, defendant pleaded

for a fifth plea, that, as to so much of the declaration referring to alleged imperfections of material and workmanship, after the occurrence thereof, and before suit, said boiler and engine were taken by plaintiff from defendants, as executors, whereby, and by force of the contract set out in the declaration, defendants ceased to be liable to damages in respect of the causes of action to which the plea was pleaded :

Held, good.—*Leonard v. Northey, et al.*, 11.

See CONTRACT—COVENANTS.



